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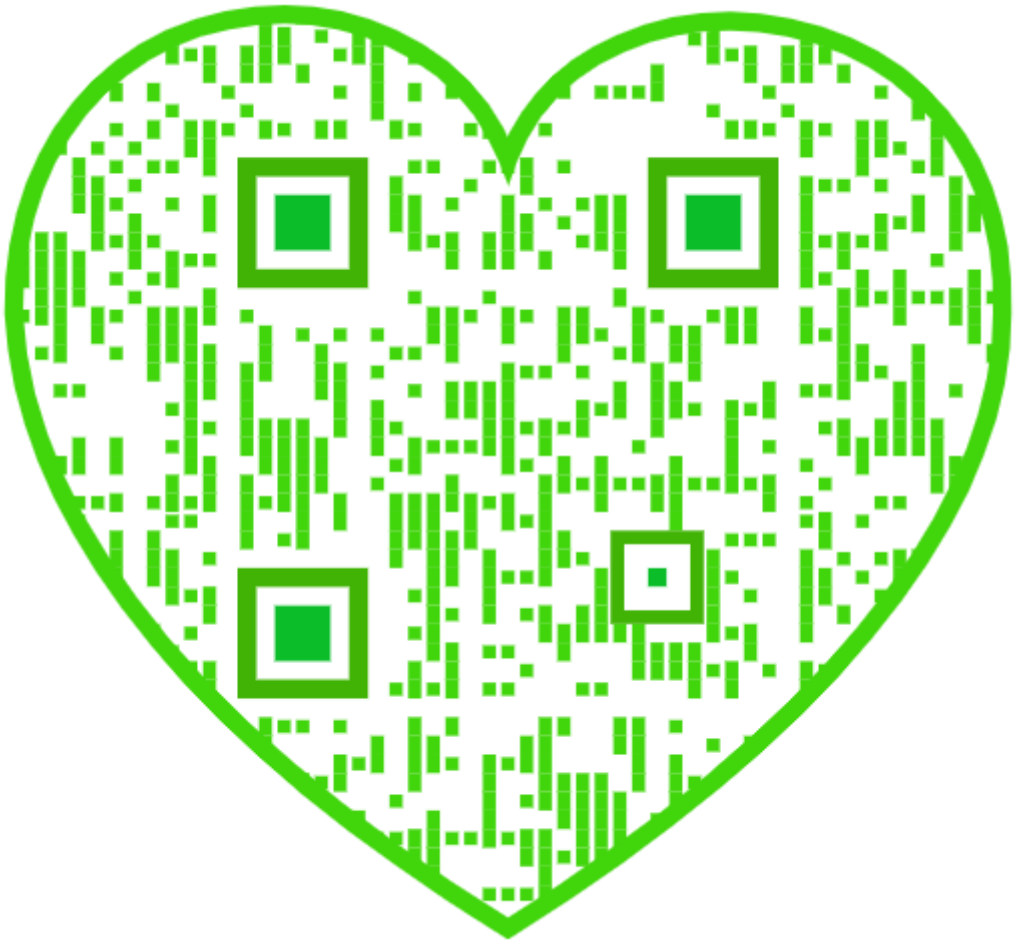

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ESTATES OF DECEDENTS

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§ 1. Scope of article. In this article some answer is to be given to the query: What becomes of a person's property, and what is done concerning a person's obligations, after his or her death? Clearly, a dead man can neither own anything nor be subject to any responsibility. The law must dictate something, however, with respect to the accumulation of legal benefits and burdens which happens to pertain to a person at the time of death, and policy demands an orderly adjustment of claims and controversies over the estate of the deceased, and an expeditious settlement of his affairs. In each of the states and territories of our country we find a distinct body of law dealing with these matters in a more or less satisfactory manner. Each of these bodies of law differs from every other in some details; and some groups of them differ from

others in many and very important particulars. It should be evident, therefore, that this article cannot include an accurate statement of any considerable portion of the law of all the jurisdictions for which it is intended. It is possible, however, to give sufficient information to enable an intelligent reader, with the aid of a careful perusal of applicable legislation, to understand the simpler matters that fall within the scope of this article. To do this is the purpose of what follows. In legal affairs of importance or involving any difficulty or complication, to proceed without the services of a competent lawyer would be as imprudent as to build a bridge without the aid of a competent engineer.

§ 2. **Division of topics.** The article is divided into three chapters. The first will discuss the devolution of the property of a deceased person, which he does not dispose of by will; the second will treat of the power of disposition by will, and the execution and nullification of testamentary instruments; and the third is designed to give some idea of the normal course of administration of the estate of a decedent.

CHAPTER I.

INTESTATE SUCCESSION.

Section 1. Survival and Devolution of Property Generally.

§ 3. **Preliminary inquiry.** In this chapter we are to consider what becomes of property which a decedent leaves without testamentary disposition. Before we do this, however, it is necessary to get some idea of the different sorts of property which may be so left.

§ 4. **Nature of property which law recognizes.** When the word property is mentioned, we naturally think of land, horses, furniture, clothes, money, and other tangible things which have a pecuniary value; but the property which law defines and vindicates is not physical. It consists of legal rights. If John Jones owns a horse, he has property in the horse—that is, he owns certain rights pertaining to the horse, which, taken together, constitute his property in it. Arthur Smith may also have property in the same horse. He may, for instance, have a mortgage on it; or a pledgee's lien against it. The mortgage or the pledge, as property of the lienor, is a bundle of rights of pecuniary value, enforceable against the mortgagor or pledgeor and others. This distinction between property rights, which are the creation of law and the subject matter of a great portion of litigation, and the physical

objects to which these rights sometimes relate, may seem mere lawyers' metaphysics and profitless; but it is as important as the distinction between the right of a person to use a public street and the street itself.

§ 5. **Property rights do not always relate to particular physical objects.** Property rights may or may not relate to particular physical objects. Let us suppose that John Jones borrows $1000 of Adam Black, and gives Black a promissory note for the amount of the loan and a mortgage on Jones' lot to secure payment. Both Jones and Black now have property in the lot, and Black owns the paper containing the written promise to pay. The transaction has given Black another piece of property also—an enforceable right against Jones to have performance of the written promise. This right, unlike the others, does not relate to any physical objects of property. Black has no title to any particular pieces of coin or paper money because of it. His claim is payable, when due, in any legal tender.

§ 6. **Rough classification of property rights.** We have not space here to examine in detail the different kinds of property interests which a decedent may leave. The greater part of these volumes is taken up with definitions and explanations of property rights of various sorts. A rough classification and a few general statements will satisfy our present purposes. Let us then throw all property rights into these three heaps: (1) Rights in certain land. (2) Rights in certain physical objects other than land. (3) Legally enforceable claims against particular persons only, and the rights pertaining to such claims. We shall find little difficulty in placing any right

which belongs in one of the first two heaps; but the proper content of the third may be obscure. As a type of this class consider a contract right for the payment of money, the transfer of property, or the rendition of services of pecuniary value. Here we have a right which is not enforceable against the world in general, but only against certain persons—the promisor and his successors to the burden (1). Pertaining to ownership of this claim there are, however, other rights good against persons generally who may happen to deny them, protecting the right to performance of the obligation against unlawful interference from the acts of third persons. The definition of these appurtenant rights belongs elsewhere. In this third class we must place also rights against banks for money "deposited," which are merely contract obligations; claims against obligors on judgments and decrees obtained in courts of justice; claims for damages for breach of contract or for injury to property; annuities; rights to rent; many of the rights of a holder of shares of stock in a corporation; and a number of other sorts of rights.

§ 7. **Distinction between rights which constitute property and those which do not.** Everyone has many rights which do not constitute property. The right to be free from unlawful assault is an instance. The distinction between property rights and other rights is that property rights have commercial value, however small, or would have were there not some special restriction on alienation.

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(1) Such a right is called technically a right *in personam* to distinguish it from rights against the world in general, which are called rights *in rem*. See Personal Property, § 1, in Volume IV.

§ 8. **Survival of benefit of claims.** Not all claims owned by a decedent will survive his death (2). For instance, rights to personal services from others, founded on agreements which contemplate the personality of the decedent as an essential element will not survive; nor, obviously, will any other right which can be satisfied only by performance to the decedent himself—e. g., a contract right to marry a certain person. Then, also, many contract claims are limited by agreement specifically for a time which does not extend beyond the death of the decedent—for instance a right to payment of an annuity for life, or for a term of years which happens to expire at the death of the holder; or a contract right to support for life. Again the right may extend beyond the life of the decedent, but his interest in it may expire at his death. For instance he may hold a life interest in a certain inheritable rent; or in certain shares of stock. Assuming of course that the life measuring the term of duration is his own and not that of another, his death will terminate his right and entitle the owner of the next interest in succession to enjoy the benefits of the rent or the shares. In such a case, there remains nothing which forms a part of the decedent's estate. The succeeding holders of the rent or shares do not take the benefits as successors to particular property of the decedent, but because of a distinct interest in the rent or shares, existing during the

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(2) We shall not consider in this article property rights held by a decedent as trustee, or in some other fiduciary or representative capacity; nor, in detail, what becomes of the partnership affairs of a decedent. The treatment of these matters is taken up in the article on Trusts, elsewhere in this volume, and the one on Partnership, in Volume VIII.

decedent's lifetime, but not entitling to enjoyment until his death.

§ 9. **Same: Actions for torts.** At common law some claims, not based on agreement or grant, will not survive the death of the holder because of their nature. Generally claims which do not constitute property within the definition contained in § 7, above, will not survive. Claims for damages to the person or to land of the decedent will not survive (3). Claims for damages caused by infringements of rights in chattels, or for losses from infringements of other sorts of personal property rights will survive (4). Claims to recover either personal or real property specifically also survive.

To illustrate some of these statements: If X trespasses on Y's land and cuts down trees, but leaves them where they fall, Y has a legal claim against X for the damage caused by the trespass. If Z later carries off the trees and sells them to W, Y has valid legal claims against Z for damages for the conversion, and against W for a return of the trees in specie. If W refuses to return the trees after a demand (5), Y has also an alternative right against him for damages for conversion of the trees. Now let us suppose that Y dies before suing on any of these claims, and before any of them are barred by the statutes of limitations. Y's administrator or executor

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(3) Pulling v. Great Eastern Ry. Co., 9 Q. B. D. 110; Hovey v. Page, 55 Me. 142.

(4) St. 13 Edw. I, c. 23; St. 4 Edw. III, c. 7; Rutland v. Rutland, Cro. El. 377; Emerson v. Emerson, 1 Vent. 187; Knights v. Quarles, 2 Brod. & B. 102; Bradshaw v. Ry. Co., L. R. 10 C. P. 189.

(5) In most jurisdictions, the demand and refusal would not be a necessary prerequisite to an action for conversion.

will have, in his representative capacity, legal claims against Z and W for damages for conversion of the trees, and against W for a return of the trees specifically. The claim against X for the wrongful trespass on the land and the incidental damage expired at Y's death (6). So also, if W had assaulted Y when he made his demand for the trees, the resulting claim for damages in favor of Y would not have survived Y. Claims for damages for libel, for seduction, and for deceit, even though it causes damage to or loss of personal property, will not survive (7).

§ 10. **Same: Judgments and decrees. Contract rights.** Generally rights founded on judgments and decrees survive. Also contract rights of a property nature, and all claims for remedies for such breaches of contract committed during the lifetime of the decedent as constitute infringements of his property interests, survive. It has been held that rights of action for such contract wrongs committed in the lifetime of the decedent as a breach of contract to marry, or a personal injury to a passenger through use of defective cars by a public carrier, will not survive the death of the wronged person (8).

§ 11. **Same: Statutory modifications.** In our jurisdictions generally there are statutes modifying the common law or this subject, some in a few particulars, others to quite a considerable extent. In a few jurisdictions remedies for wrongs of almost all sorts survive, with some exceptions. Little good would be accomplished by a con-

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(6) Williams v. Breedon, 1 B. & P. 329.

(7) See Cutting v. Tower, 14 Gray 183; Jenks v. Hoag, 179 Mass. 583.

(8) Hovey v. Page, 55 Me. 142; Cregin v. R. R. Co., 83 N. Y. 595.

sideration of the specific variations in these statutes, within the limited space we could devote to it. The general, important, substantial change is the addition of claims for wrongful damage to the decedent's land to the rights that survive. In every case, the particular statutory provisions applicable must be carefully consulted.

§ 12. **Survival of property rights other than claims.** Property rights generally, other than claims, survive the death of the holder, unless so limited in their creation as to be confined within the space of his life. An estate for the life of the holder, and an interest in land for a number of years, which happens to run out with the life of the holder, are examples of property which does not survive. There are similar interests in chattels. An interest held at the will of another terminates at the death of either person.

§ 13. **Distinction between real and personal property as regards succession.** Another division of property rights into two large classes is of very great importance throughout the study of the topics covered by this article. Roughly speaking, all interests in land, other than interests for years (9) and liens, and all inheritable rents are real property. All other property, with uncommon exceptions, is personal. The points at which this division becomes of importance are many. The ones of which we

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(9) By statute in some jurisdictions, an interest in land for the life of another than the holder is *real property* only during the life of the grantee or devisee. There are comparitively rare types of real property other than those which I have specified; but we need not at present concern ourselves with them. Inheritable rents are technically considered to be interests in land.

shall take particular note are indicated in the following brief statements.

(a) In many (but not in all) of our jurisdictions, the real property of an intestate does not necessarily devolve on the same persons as does the right to his personal property, after administration. The persons designated by law to take real property as successors to an intestate owner are called technically *heirs*. The persons who are entitled to distribution of his personal property, after administration, are called technically *next of kin*.

(b) In most (but not in all) of our jurisdictions, the administrator of an intestate estate, who has general charge of the personal property during administration, has no control over the real estate of the decedent, except a limited power of sale under order of court for the purpose of paying debts.

(c) In many of our states, the formalities and other essentials concerning a valid will of real property differ considerably from those concerning a valid will of personalty.

(d) In most of our jurisdictions, there exists a principle of administration that, in the absence of testamentary expression indicating the contrary, the personal property of the decedent is the primary fund for the payment of debts.

§ 14. **Conflict of laws concerning decedent's property or affairs.** Frequently a person dies owning tangible things of various sorts in domestic and foreign jurisdictions, other than that of his domicile, and having obligors in different parts of the country. The laws concerning the devolution of property upon death of an owner,

the administration of the affairs of a decedent, and the execution and effect of wills, may differ considerably in the several states, territories, and foreign countries in which the decedent has interests. When this is the case, it becomes necessary to decide which of the apparently conflicting governmental dictates are controlling, in each particular matter concerning the settlement of the estate. The consequent investigation carries one into that field of jurisprudence known as Conflict of Laws or Private International Law. See Conflict of Laws, Chapter V, in Volume IX of this work. As much of this field as it suits our present purpose to explore is indicated by the following rules:

(a) In all matters concerning the intestate devolution of title to interests in land and its appurtenances, or other property which can be enjoyed only in one certain jurisdiction, or concerning the validity and effect of testamentary expression pertaining to such property, the law of that certain jurisdiction is controlling.

(b) In all matters concerning the intestate devolution of title to other sorts of property, and concerning the validity and effect of testamentary expression pertaining to such property, the law of the domicile of the deceased is controlling, except when governed by express statute of the place where the property is located.

(c) In all matters concerning only judicial procedure and the process of administration, the law of the jurisdiction in which the proceedings are instituted will control.

§ 15. **Devolution of property rights appurtenant or incidental to other property.** Frequently a property right is

attached as an appurtenance or as an incident to other property, in such a manner as to follow that other property through its various changes of ownership. For instance, there are generally covenants in leases of land between the landlord and tenant, concerning their respective rights and duties in that relationship. Such covenants are said "to run with the land" and "with the reversion"—that is, the benefit and burden respectively of one of these agreements will attach to the interest in the land of the person assuming it, and will go to his successors to that interest as an appurtenance. Therefore, a person who takes the landlord's interest by descent or devise will succeed to the benefits of all covenants made in the lease by the lessee as tenant, and vice versa. In other parts of this work, descriptions are given of other rights of various sorts which may be attached in like manner to the possession of a certain piece of land, or of other property, or to a particular interest. It is to be noted then, that these appurtenant or incidental rights, during the period of their existence, follow the particular property to which they are attached through intestate and testate succession (10). See Rights in Land of Another, and Landlord and Tenant, in Volume IV; and Equity Jurisdiction, elsewhere in this volume.

Section 2. Marital Rights of Succession.

§ 16. Rights of surviving husband in wife's personal property before and after her death: At common law. At common law, a married woman's personal property be-

(10) See Anonymous, Jenk. 241; Ayers v. Dixon, 78 N. Y. 318.

came her husband's absolutely, either upon marriage, or, in the case of choses in action and chattels real, as soon as he reduced it to his possession during the marriage, with the exception of such property as was secured to her as her separate estate in equity free from his control. If the husband died before the wife, such of her personal property as he had made his, by reduction to possession during the marriage, was administered and distributed as part of his estate (11). If the husband survived the wife, and she left any personalty which he had not already taken, he had the right to be appointed administrator of her estate, and might then reduce to possession and hold all the balance of such personalty, after payment of her debts, funeral expenses, and the expenses of administration (12). If the intestate wife left separate personal property in equity, the surviving husband might take it as his without administration, if it consisted of chattels in possession; or, as administrator, he might reduce it to possession for his benefit (13).

§ 17. **Same: Under statutory modifications.** These rights of a husband to his wife's personalty during the marriage have been abolished or greatly modified by legislation known generically as "Married Women's Property Acts" (14). Generally, the husband's rights in the wife's personal property during marriage have been entirely

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(11) Caffey v. Kelley, Busbee's Eq. 48; Howard v. Menifee, 5 Pike, 668; Jordan v. Jordan, 52 Me. 320; Hayward v. Hayward, 20 Pick. 517; Riley's Adm. v. Riley, 19 N. J. Eq. 229.

(12) Judge of Probate v. Chamberlain, 3 N. H. 129.

(13) Cooney v. Woodburn, 33 Md. 320.

(14) See the article on Domestic Relations and Persons, §§ 29-36, in Volume II of this work.

abolished. However, the husband has in some states a right of succession to all of the personalty of which his wife dies intestate; and, in several states, she cannot effectually bequeath all of her personalty without his consent. In states where a surviving husband does not succeed to all of his intestate wife's personalty, generally he shares the balance, after administration, in varying proportions with other relatives of the deceased. If there are descendants, he takes with them a proportion varying from a child's share to one-half. If there are no descendants, he takes usually either all or one-half of the personalty.

§ 18. **Marital and successory rights of husband in wife's realty: At common law.** At common law a husband had the right, during marriage, to control and take the income of all realty of his wife, except such as she held as her separate property in equity. This right ceased at the death of either husband or wife, as to any profits subsequently accruing. If the wife died first, leaving estates of inheritance, these descended to her heirs of whom the husband was not one, free from any right in him except, under certain circumstances, his estate by curtesy (15).

The husband's *estate by curtesy* existed at common law only in tenements in which the wife had a beneficial interest, which in its nature might be inherited by issue of the marriage. If the wife held merely as trustee, or the limitation of the inheritance was such as to bar children of the marriage, no curtesy could be claimed by the husband. Furthermore, no curtesy would exist in tenements

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(15) Babb v. Perley, 1 Me. 6.

of which the wife was not seized (i. e. roughly, had not present enjoyment) at some time during the marriage. Upon the birth of issue capable of inheriting the tenement, the husband became *tenant by the curtesy initiate.* At the death of the wife, a surviving husband who was able to show that all the foregoing requisites had occurred, became entitled to hold the particular tenements for his own life only. The fee, or inheritable interest, entitling to enjoyment at his death, descended to the heirs of the wife (16).

§ 19. **Same: Statutory modifications.** These marital rights of husbands in the realty of their wives have been abolished or modified by statute in all our jurisdictions. Generally the marital rights of the husband to enjoy any of his wife's separate real property during marriage, except by virtue of curtesy initiate, has been abolished. In some states where the right to curtesy has been retained, it does not entitle to enjoyment until the death of the wife; but, in others, the husband may hold and enjoy the land by virtue of an estate by curtesy initiate. In some states the wife may defeat the enjoyment of an estate by curtesy, by conveying the tenement in her lifetime; and, in some states, even by devising it. In many states curtesy has been entirely abolished. In a few of these states the husband has been given a statutory dower right, corresponding to a wife's dower in her husband's realty.

§ 20. **Rights of husband as heir to his wife.** At common law, a husband never took real property as *heir* to his intestate wife, because of that relationship. Under

(16) Lit. §§ 35, 52, 90; Co. Lit. 29a, 29b, 30a, 40a, 67a; Ferguson v. Tweedy, 43 N. Y. 543.

statutes in many of our states, however, a husband takes half of his intestate wife's realty if she leaves no descendants. In many, he takes one-third if descendants survive the wife. In some, he takes all if no descendants survive; in others, all only if the wife leaves no children, father, mother, brother, or sister, or descendants of any of these. In some states, the husband is still not entitled to succeed as heir to realty of his deceased wife.

§ 21. **Community property.** In some of our states there exists a sort of marital ownership of property of civil law origin. The details differ in these several states, but, in general and roughly, all property acquired by husband or wife after marriage, not by way of gift, descent, devise, or bequest, nor by way of increase or profit from their separate property, is community property. Generally the husband is given control over the community property during the continuance of the marriage; but he cannot, without consent of the wife, make a gift of any part of it. At the death of the wife, the husband, in some states, keeps all the community property without administration. In others, the surviving husband takes only a half, either at all events, or if children survive the wife. The half which a husband does not take goes to the heirs and next of kin of an intestate wife. In most of the states in which this sort of ownership exists, a surviving wife takes half of the community property, the other half going to the heirs and next of kin of an intestate husband. In one state, however, the surviving wife takes all if there are no children living at the husband's death (17).

(17) Texas Rev. Stat. 1888, §§ 2851, ff; Cal. Civ. Code, §§ 1401 and 1402; La. Civ. Code 1870, art. 2399, ff.

§ 22. Rights of widow in intestate husband's personalty. The rights of a surviving wife in community property have been touched on in the preceding subsection. Of the balance of other personalty of her deceased intestate husband, she is given, after administration, a share which varies with circumstances and the jurisdiction of the domicile; or, under some circumstances, in some jurisdictions she is given all. Generally, if there are no surviving descendants, she is given either all, one-half, a greater portion, or all up to a certain amount in value and one-half the balance in addition. In some states she takes all only if there are no issue, parents, brothers, or sisters of the deceased, or children of brothers or sisters. In some, her share is increased if there are no parents and no descendants of the deceased. If there are surviving descendants of the deceased, the widow takes either a child's share (but in some states her share is not to be in any case less than a certain portion of the estate, as, for instance, one-third, or one-fifth), or a third, or a half.

§ 23. Dower of widow in husband's realty: At common law. At common law a wife acquires, in all tenements of which the husband becomes seized during marriage by virtue of a legal and beneficial estate of inheritance which is descendible to issue of the marriage, an inchoate dower right as soon as the seizin occurs. This right becomes consummate if she survives the husband, and then entitles her to have set off one-third of such of these tenements as may be enjoyed without committing waste, to hold for the period of her life. She has this right even with respect to lands which the husband has conveyed to purchasers during the marriage, unless she has barred her right by join-

ing in the deed for that purpose or otherwise. This dower right, and a right, which was endorsed by Magna Charta, to "tarry in the chief house of her husband by forty days after the death of her husband, within which time her dower shall be assigned her" are the only interests which a widow has in the realty of her intestate husband at common law. She is not an heir of her husband (18).

§ 24. **Same: Statutory modifications.** The law of dower has been variously modified in most jurisdictions of this country, and has been totally abolished in some. Where it still exists, it is generally given not only in legal estates but also in equitable interests of which the husband is possessed at the time of his death. In some jurisdictions all dower rights are confined to holdings of the husband at his decease—that is, the inchoate dower right is abolished. In a few states this change has been made with respect to the widows of non-residents, but not with respect to the widow of a man domiciled in the state at the time of his decease. In some states dower in *one-half* of the realty of which the husband died possessed is given to the wife, if he left no descendants; otherwise the share in which dower is given is one-third.

§ 25. **Effect of testamentary provision in lieu of dower.** A provision for the wife in the husband's will is not presumed at common law to be in lieu of dower, but it may be made expressly to bar it. If there is such a gift to bar dower, the widow cannot take both it and her dower. She may elect to take either, however. In many jurisdictions there are statutes under which a testamentary gift to

(18) Lit. §§ 36, 37, 53; Co. Lit. 31a; 2 Bl. Com. 129, ff; 2 Bl. Com. 130; Co. Lit. 34b.

the widow will be construed to be in lieu of dower, unless the contrary appears from the will to have been the testator's wish. Also, statutes in many jurisdictions prescribe the time within which the widow must exercise her right to elect, and the effect of a failure to do so within the period limited. The effect generally is that her dower right is barred and she may take under the will. There are various means by which dower may be barred with consent of the wife, before the decease of the husband; and various ways in which the right may be lost, either as regards a particular piece of land or altogether.

§ 26. **Assignment of dower.** At common law it was the duty of the heir to assign the widow's dower within forty days after the death of the husband. The ordinary method of doing so was to set off by metes and bounds a fair one-third of each of the tenements in which she had a dower interest. If a division of this sort was impossible, she might be assigned one-third of the rents and profits of the tenement for life; or, with her consent, some other satisfaction might be made. No deed of assignment was necessary where an assignment of thirds was made (19).

In many of our states there are statutes regulating the assignment of dower. Sometimes it is required to be in writing. In some, the court of probate is given jurisdiction to adjust disputes over the dower right, and to assign the widow's share in a summary proceeding. In other states the probate court has no jurisdiction to assign dower or to settle disputes concerning it, and such matters must be litigated in other courts, if no agreement can be

(19) Lit. § 36; Co. Lit. 34b; Co. Lit. 32a; Lit. § 44; Schnelby v. Schnelby, 26 Ill. 116; Stoughton v. Leigh, 1 Taunt, 402.

reached. Where there are no statutes to the contrary, the heir still has the right and duty of assigning the dower within the limited period, which is in some jurisdictions of different length than at common law. Sometimes the ordinary methods of assigning dower are found impracticable as to a certain piece of property. When this is the case and the parties cannot come to an agreement, the court in which suit is properly brought to settle the matter will now and then find it necessary to sell the property and assign the widow either interest on a third of the proceeds for life, or a gross sum in satisfaction of her right, where the law of the jurisdiction authorizes such a course. If a gross sum is given, it should be large enough to purchase an annuity for the rest of her life, equivalent to interest at the legal rate on one-third of the net proceeds of the property sold. The probable duration of her life can be ascertained from mortality tables.

§ 27. **Quarantine of dower.** In § 23, above, was mentioned the common law right of a widow to remain in the principal dwelling house of her husband for forty days after his death, the period for the assignment of her dower. It exists in many jurisdictions of our country, but in some of these the time has been changed by statute—for instance, to ninety days, or to two months, or a year after the death of the husband, or to an indefinite time until dower is assigned. In some jurisdictions quarantine of dower has been abolished. The right does not exist in anything except the dwelling-place of the deceased at the time of the decease—and not in that unless the husband owned an estate of inheritance in it (20).

(20) Clary v. Sanders, 43 Ala. 287; Pizzala v. Campbell, 46 Ala. 35.

§ 28. Widow's rights as heir. As stated in § 23, above, a widow did not inherit any of her intestate husband's realty at common law. Under the statutes of most of our jurisdictions, however, she is given rights as heir, if the husband leaves no descendants; and, in some states, she is given a third or a half of the realty absolutely, even though there are surviving issue. The statutes of some of these last mentioned states allow the widow to elect to take this share of the realty, in lieu of provisions given her by her husband's will. Where the widow is given a portion in the realty in the absence of issue, this portion is generally either one-half or one-third; but in some jurisdictions is all, or all up to a certain value. In many, she is entitled to all the realty as well as the personalty, if neither descendants, father, mother, sister, nor brother of the deceased, nor issue of brother or sister survive him.

§ 29. Right of widow and minor children to allowance for support. In almost all of our jurisdictions there are statutes giving a right to the widow of the decedent to have from the estate, either immediately upon the death of her husband or soon thereafter, some specific property or a sum of money for the temporary support of herself and her minor children. The time when this allowance is to be made and its nature and amount differ widely in the various jurisdictions. In some states only enough to satisfy the needs of the famly for a few weeks may be given; in others, specified property of various sorts and considerable amount, or a sum of money equivalent to the value of such property, may be claimed for this purpose. In many jurisdictions the giving and the amount of the allowance is left to the discretion of the probate court.

In some states the time during which the widow has the right to be supported by allowances extends over a year from the death of the decedent. In some jurisdictions the right of the widow to an allowance is absolute, and independent of the sufficiency or insufficiency of her separate property to support her needs. In others, it is to be permitted only where necessary, and is to cease with the necessity (21). The widow generally takes her allowance in preference to all claims against the estate, other than incumbrances and liens, even though it is insolvent (22). In some jurisdictions the amount of the allowance is deducted from her distributive share when that is paid; but generally the right is distinct, and is additional to her claim as statutory distributee. Some statutes provide that the allowance is for the support of widow and minor children; but the widow generally has the ownership and control of it. If the decedent leaves minor children but no widow, they generally have a similar right.

§ 30. **Right of homestead.** In most states there exist statutes permitting the acquirement of certain rights of exemption called homestead rights. Usually the homestead "declared" must be the land on which the person making the declaration dwells. The purpose of the right is to secure the homestead from seizure by legal process for debts of its owner. It is meant for the protection of wife and children, as well as for that of the "head of the family" who makes the declaration. The precise nature and extent of the right and the method of acquir-

(21) See Cal. Code Civ. Proc. §§ 1464-1470.

(22) See Cal. Code Civ. Proc. § 1467; Mass. Gen. St. 1882. ch. 135. §§ 1, 2, p. 770; Mo. Rev. Stat. 1889, § 105.

ing it differ greatly in the different states and territories. It is mentioned here for the purpose of noting that, in many jurisdictions, a widow or minor children succeed to such a homestead right, either absolutely or during their respective widowhood or minority, upon the death of the owner either testate or intestate; and also that, if the deceased husband has not left such a homestead, the widow or minor children often have a right to assignment of one, or of a substitute sum of money which takes precedence to other unsecured claims against the estate. The details, circumstances, and variations of these rights would require a ramified and technical exposition, for which we have not sufficient space and from which little to our purpose would be gleaned (23)

Section 3. Rights of Heirs and Next of Kin.

§ 31. Rights of descendants in estate of an intestate. Succession per stirpes. Among the surviving descendants of an intestate are found generally his principal heirs and next of kin. Surviving children and those surviving descendants of deceased children who, by the rules of representation to be mentioned presently, are entitled to stand in the place of the deceased children, take all the realty subject to, or after satisfaction of, the requirements of administration, and all the personalty after administration, excepting such parts of or interests in both realty and personalty as go to the surviving husband or wife.

If a decedent leaves children and children of deceased

(23) Cal. Code Civ. Proc. §§ 1474-1476; Vt. St. 1894, § 2183.

children, these children and grandchildren take as much of the realty and personalty as goes to descendants. The children of each deceased child, in such a case, together take only the share which would have gone to their parent had he survived. That is, they take *by representation* or *per stirpes*. To illustrate: If X dies, leaving A, a son, and B and C, the children of a deceased daughter, A takes one-half of as much of the realty and personalty as goes to the descendants, and B and C together take the other half. This principle of descent and distribution per stirpes to issue of a person, who would have been an heir or one of the next of kin of decedent had he survived decedent, is applicable in all of our jurisdictions, when descendants of intestate of one generation and issue of deceased brothers or sisters of these descendants survive him. It is applicable also in various other cases of inheritance and succession to an extent and with an effect that varies radically in the different jurisdictions. So much variation is there in scope and in details between the statutes and case law of the numerous states and territories that, as is the case with the subject of intestate succession generally, it is impossible to give an accurate and useful summary of the ramifications.

§ 32. **Intestate succession of and from adopted children.** Rights of children legally adopted depend upon the statutes under which the adoption took place, and the laws of the domicile of the decedent in the case of "movable" property; and these and the law of the jurisdiction in which the property is situated in the case of "immovables." Their rights of intestate succession differ in the different jurisdictions where adoption is

provided for by statute. In some, they are put on the same footing as natural children. In other jurisdictions they can inherit realty and personalty from the adopting parents, but not from collateral relatives of the adopting parents. In some states the adopting parents can, and in others they cannot, in that capacity take by succession the property of the adopted children. In some states adopted children can take by inheritance from, or as next of kin to, their natural relatives, including their natural parents. In some, the natural parents take by succession, in preference to the parents of adoption, the property of an intestate adopted child who leaves no issue nor spouse. Generally, succession to and from the descendants of adopted children will be governed by the same principles as is succession to and from the adopted children themselves. See Domestic Relations and Persons, § 98a, in Volume II.

§ 33. **Intestate succession of posthumous children.** A posthumous child of the decedent is entitled to take as heir and next of kin to the same extent as if he had been born before the decedent's death. It is also provided in some states that a posthumous child of another than the intestate shall be considered in being at the time of the death of his parent, for the purpose of taking by right of representation (24).

§ 34. **Intestate succession of parents.** If an intestate decedent leaves legitimate descendants, his or her parents nowhere share in the estate. If there are no descendants who are entitled to succeed, a surviving father in some

(24) Co. Lit. 11b; Cal. Civ. Code, § 1403.

states takes all the realty and personalty, subject to the requirements of administration, excepting such as goes to the surviving spouse. In some states the mother shares with him, if she also survives. In others, the mother takes only in case the father is dead. In some jurisdictions where the parents take in common, if one dies before decedent, the other's share is doubled; in other jurisdictions the surviving brothers and sisters of the decedent and the issue of deceased brothers and sisters take the portion that would have gone to the dead parent. In some, the surviving parent takes the other half, if there are no sisters, brothers, or descendants of sisters or brothers. In some states the parents do not take the same interest in the realty that they do in the personalty. In some, they share both realty and personalty with brothers, sisters, and descendants of deceased brothers and sisters, the last taking per stirpes. There are other variations, but enough has been said to give a general idea of the position of parents as heirs and as next of kin.

§ 35. **Succession of brothers and sisters and remoter relatives.** Generally brothers and sisters of decedent, and the descendants of deceased brothers and sisters per stirpes, come next in order of preference after issue, husband or wife, and parents. In some states they share with the parents; and in some, with the father alone, taking in preference to the mother. In some jurisdictions they take in preference to both parents. In some, no descendant of a deceased brother or sister, remoter than a child, is entitled to take by representation. In some, grandchildren of a brother or sister also may take by representation. In others, any descendants of deceased

brothers and sisters may take in common with the surviving brothers and sisters, providing none of their lineal predecessors of intervening generations are living. After the relatives already mentioned, come generally the other collateral kindred in an order determinable in varying ways in different jurisdictions, but it would not profit us to carry the examination of intestate succession any farther in a non-technical work.

§ 36. **Collateral relatives of whole-blood versus collateral relatives of the half-blood.** In some jurisdictions collateral relatives, or brothers and sisters and their descendants "of the half-blood," that is, having only one common ancestor with the decedent, at the point of juncture of their respective lines of descent, are postponed in order of succession to collateral relatives "of the whole-blood" of equal degree of relationship to decedent. In other jurisdictions they take only half shares with those of the whole-blood. In some jurisdictions they take equally with those of the whole-blood, except where the property concerned came to decedent through descent, devise, or gift from the line of relationship with which they have no blood connection. In this case they are excluded from the succession. In some jurisdictions, collateral relatives of the half-blood are put upon the same footing as collaterals of the whole-blood in all particulars.

§ 37. **Effect of illegitimacy upon intestate succession.** An illegitimate child is in many jurisdictions incapable of inheriting or taking by intestate succession from anyone except his or her mother, spouse, or descendants. In

other jurisdictions he or she may also take from other kindred on his mother's side; and, in some, from his father or mother, if there is no one else except the state capable of taking. In most states the mother and those claiming relationship through her may take by intestate succession from an illegitimate child, in the order of preference indicated by the local law of descent. Legitimate descendants and husband or wife of an illegitimate person are everywhere allowed to take. In many states it is provided that subsequent marriage of the parents shall legitimatize children born out of wedlock; and in some states recognition of the child by the father in certain ways prescribed by statute will place it on the same footing with respect to the father, as though it were legitimate (25).

§ 38. **Effect of alienage on intestate succession.** In some of our states, alienage of the intestate, or of the persons who claim as heirs, or of some persons through whom the claimants trace their connection with decedent, has an effect upon the succession to intestate realty. In some states an alien cannot hold land against the state and cannot inherit land. In some, no one can make good title to land as an heir, if he must trace his connection with the deceased through an alien. In others, however, the common law inability of aliens to inherit and to hold land has been abolished, and alienage no longer presents obstacles to the course of descent. In some jurisdictions, aliens can hold land for only a limited number of years. Alienage is no bar to holding or to taking "movables"

(25) 2 Bl. Com. 249; Cal. Civ. Code, §§ 1387, 1388, 230.

through intestate succession or otherwise. It is to be noted in this connection that treaties of the United States with foreign countries, giving citizens of those countries the right to inherit and hold land in the United States, override any state legislation or common law rule opposed to the treaty stipulations (26).

§ 39. **Effect of crime on criminal's capacity of intestate succession.** Crime in and of itself does not affect the criminal's capacity of intestate succession; but, in some states, conviction of a felony and sentence to imprisonment in the state penitentiary will deprive the convict of the right to inherit or to take as intestate distributee, during the continuance of his term. Likewise, in some states a convicted murderer cannot take as heir or intestate distributee of his victim (27).

§ 40. **Effect of advancements to heirs and distributees.** Frequently a father gives money or other property to his son—for instance, to start him in business—as an advancement of part of his prospective share, as one of the future heirs and distributees of the father's estate. Likewise a daughter is sometimes given a marriage portion or other donation, with an intent, tacit or otherwise, on the part of the donor that her share as co-heir or co-distributee shall be reduced pro tanto in favor of the other children who may survive. Such an advancement is to be distinguished from a loan. A loan creates a debt which must be satisfied, unless it is forgiven or barred in some legal manner. An advancement is a gratuitous transfer

(26) 2 Bl. Com. 249; Hauenstein v. Lynham, 100 U. S. 483.
(27) Est of Donnelly, 125 Cal. 417; Cal. Civ. Code, § 1409.

of property and creates no obligation on the part of the donee. However, in many jurisdictions, there are statutes providing that advancements to children of an intestate, and in some states that advancements to other specified kindred, shall be deducted or "brought into hotchpot" in determining their shares as co-distributees of the estate of the deceased (28). Everywhere, if it is found that a transfer to a presumptive future heir was made by the intestate as a loan, the heir is held accountable to the estate therefor in some way, unless the debt so created has been forgiven, satisfied, or barred.

It is to be carefully noted that a gift to a child or other presumptive heir is in no case an advancement, unless so intended. It may constitute a gratuity in no way connected with the recipient's prospective relation to the donor's estate. It is not necessary, however, that the donee of the advancement shall be aware of the fact that it is such at the time he receives it, unless legislation indicates the contrary. In some jurisdictions, the statutes prescribe that no gift shall be considered an advancement, unless it is evidenced in a particular manner—as, for instance, by the terms of the grant, or by some written charge of the donor, or written acknowledgment of the donee. In some jurisdictions, the share of one who takes through intestate succession, by virtue of representing a deceased ancestor, is subject to reduction because of advancements made to this ancestor by the intestate. For instance, a grandson who is co-heir with children of

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(28) See Cal. Civ. Code, §§ 1395-1399.

an intestate, as representative of his deceased father, will be required to bring into hotchpot in some jurisdictions the value of advancements to his father as well as those to himself.

§ 41. **Intestate succession by the state.** If a person dies leaving property not effectually devised or bequeathed, and leaving no relative entitled to take it under the law of intestate succession, it goes to the state as ultimate heir. In some states legislation has appropriated the word "escheat" for describing such succession to personal property as well as to land, and has expressly provided that all property of a decedent shall be seized by the state under the circumstances specified above (29).

§ 42. **Conclusion.** There are claims which will survive against the estate of the obligor. What sorts will survive and how they are to be satisfied will be discussed in Chapter II, below. Encumbrances upon particular property belonging to the estate are generally unaffected by the death of its owner. It is also to be noticed that property rights of others, in things belonging to the deceased, are no part of the estate, and may have the effect of withdrawing the thing entirely from administration. For instance, if the deceased had an interest in a chattel for his life only, the chattel may be taken by the owner of the next interest in succession, and forms no part of the property of the estate. The executor or administrator has no right to possession of it.

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(29) For types of statutes regulating intestate succession see Cal. Civ. Code, §§ 1384-1407; Pub. Stat. of Mass. 1882, cc. 124, 125, 135; General Laws of Mass. 1885, c. 276.

In conclusion the reader must be reminded that this chapter contains only a rough and fragmentary outline of the very complicated and technical subject of intestate succession, and that, for a satisfactory notion of the law of any particular state or territory on the points discussed, a careful reading of the local statutes is essential.

CHAPTER II.

WILLS.

Section 1. Wills and Their Scope.

§ 43. **What is a will?** Our first inquiry naturally is, what is a will? When we use the word colloquially, we probably have a vague concept of a formal document of supposed legal efficacy after the death of the maker. The tangible ink and paper are essential elements of this concept. Sometimes, however, when we speak of such and such purposes as the testator's will, we mean, not the physical document by which he has sought to accomplish them, but the intent of the testator itself. There are also other ideas which we now and then convey by the same word; but these will suffice to distinguish and fix its technical significance. When lawyers use the term technically, they do not mean a certain tangible document; they do not mean the testamentary ideas of a person. They mean all the words, signs, and symbols, which the testator has issued and has left unrevoked to indicate what shall be done concerning his property and affairs after his death; or, if they use the word with a tacit modification, they mean as much of this expression as is entitled to probate.

§ 44. **How a will differs from other legal instruments.** Certain superficially similar sorts of instruments of

transfer are to be distinguished from wills. A person may make a deed conveying property to another to hold after the grantor's death. If legally effectual, such a transfer gives the grantee immediately a future interest in the property, subject to a life interest retained by the grantor—in other words, it is a grant inter vivos. Therefore the instrument is not a will. It is not uncommon for a person to execute and acknowledge a deed of grant and hand it to another, with directions that he shall hold it until the death of the grantor, and then deliver it to the grantee. It is a rule of law that a deed is not effective until delivery; but a sort of delayed delivery may be made, in the manner just specified, which will vest an interest in the grantee from the time when the depositary takes the deed. Such a transaction is sometimes called a delivery in escrow. See Title to Real Estate, §§ 105-8, in Volume V of this work. The instrument is not a will, because there passes presently to the grantee an irrevocable right to have the deed and enjoyment of the property at the death of the grantor. In practical effect the beneficial interest retained by the grantor is one for life only (1). The essential distinguishing characteristic of a will is that it has absolutely no effect as a legal instrument until the death of the testator, and is revocable until that time (2).

§ 45. **Scope of testamentary power.** A person's power of disposing of his property by will, in most of our states, is very extensive, but it is not unlimited. Let us make the

(1) Bury v. Young, 98 Cal. 446.

(2) Nichols v. Emery, 109 Cal. 323; Pinkham v. Pinkham, 55 Neb. 732.

general statement that a person may, with certain limitations, devise or bequeath all the beneficial property rights of which he dies possessed and which do not terminate at his death; then let us proceed to note very briefly some of these limitations.

(a) As is pointed out later (§ 107, below), under the former English law a real property interest could not be devised by a will made before the testator acquired substantially that identical property interest. In most, if not all of our jurisdictions of today, this is not the law, although it formerly was in many of our older states. (b) With respect to that sort of marital property existing in some states under the name of community property, the husband has in some of these jurisdictions no power of testamentary disposition, and in some a husband can will only half away from the surviving wife. (c) In many states the dower right of a surviving wife, discussed in the preceding chapter, is a limitation upon the power of testamentary disposition of the husband. In some states the right of curtesy of a surviving husband, which is also discussed in Chapter I, places a restriction upon the wife's power of disposition. (d) Claims of creditors and the statutory allowances for the support of widow and surviving children form another class of restrictions upon testamentary disposition. (e) There are in some states other limitations in favor of wife or children, which are not so common and uniform as to render it advisable to specify them here. (f) There are statutory provisions in many states avoiding gifts for charitable purposes, by a will made within a certain period of the testator's death. The period varies from thirty days to a

year. Also, in some jurisdictions, a testator cannot leave more than a certain portion of his property—varying from one-fourth in value after payment of debts, to one-half—to charitable purposes, if he leaves wife, child, or parent; or in some states if he leaves any legal heirs. (g) There are also other limitations of various sorts—for instance, avoiding gifts against public morals or policy; avoiding gifts which prevent the alienability of property for indefinite and possibly too extensive periods, or which will not vest perhaps until too remote a period; and so forth. To specify all these limitations with particularity would carry us far beyond the scope of this work.

Section 2. Gifts Mortis Causa.

§ 46. **Gifts mortis causa.** There is one method by which a person who anticipates death may dispose of certain sorts of personal property, which is so similar in effect to bequeathing that it is difficult to point out the practical difference. If one in his last sickness or in danger of death, realizing his condition or situation, delivers possession of a chattel to another and expresses that he is doing so by way of gift in view of his (the donor's) expected demise, a title thereby passes to the donee which is voidable by the donor at any time before his death, and is nullified ipso facto by his recovery from the sickness or escape from the peril. Such a transaction is called a *gift mortis causa.* It differs from an ordinary gift inter vivos in its voidable quality, and from a testamentary gift in that an interest passes at once to the donee, where-

as a will is totally inoperative until the death of the testator (3).

Rights in chattels are not the only sort of property that may be transfered mortis causa. In most jurisdictions, choses in action which are represented in a tangible form by some such document as a promissory note, a bond, or a certificate of stock, may also be the subjects of a gift of this sort (4). A delivery, which is an essential element of a good gift mortis causa, cannot be made of the incorporeal obligation, but a transfer of possession of the documentary indicia of the claim generally is considered a sufficient analogue to warrant a declaration that the beneficial title is in the donee. If the chose is negotiable—as, for instance, a note for a certain sum of money payable to bearer or to the order of a specified payee—the legal title may be vested in the donee by the usual process of transfer, i. e., delivery simply in case the note is payable to bearer, endorsement and delivery in case it is payable to order.

§ 47. **Same: Non-documentary choses in action.** Choses in action, which are not represented by a document constituting the foundation of the claim, cannot be transferred by delivery mortis causa. Perhaps an illustration will serve to emphasize this distinction. A savings-bank account can be given to a person mortis causa through a delivery of the bank-book, containing a record

(3) Debuison v. Emmons, 158 Mass. 592.

(4) Edwards v. Wagner, 121 Cal. 376; Grymes v. Hone, 49 N. Y. 17. In some states, however, a share of stock cannot effectively be given by a delivery of the certificate, without a transfer on the books of the corporation. Baltimore etc. Co. v. Mali, 65 Md. 93. Land cannot be delivered by way of gift *mortis causa*: Meach v. Meach, 24 Vt. 591.

of the account and the contract of the bank with the depositor. The bank-book in such a case is the documentary foundation of the right. On the other hand, an ordinary checking account cannot be transferred by a mere delivery of the pass-book. The ordinary pass-book is only a sort of receipt to the customer. It does not contain the terms of his contract and forms no essential element of his claim against the bank (5). An effective gift mortis causa of the donor's own promise, whether spoken or written, or of his check upon his bank account, cannot be made. In the first case, there would be an attempt, not to transfer property, but to create a contract right in the donee, which would fail because of lack of consideration; in the second, the check would constitute only an order on the bank, which might be rescinded by the donor at any time before payment, and would be annulled by his death (6).

Since a donation mortis causa passes title in the lifetime of the donor, the subject of the gift forms no part of his estate after his death and does not go through the course of administration.

Section 3. Testamentary Intent.

§ 48. **Testamentary intent.** The first essential of a will is testamentary intent. If a claim is made that a certain expression of a decedent constitutes a will, it must be established that he made it for testamentary purposes. If it turns out that what is apparently a formal will was executed by the decedent as a joke, or as an illustration

(5) Pierce v. Boston Savings Bank, 129 Mass. 425; McGonnell v. Murray, L. R. 3 Eq. 460.

(6) Tracy v. Alvord, 118 Cal. 654; Tate v. Hilbert, 2 Ves. Jr. 111.

of his conception of the proper form for a testamentary paper, and with no idea of giving directions concerning his affairs, it is a nullity (7). Likewise, if it is shown that the decedent executed a writing, offered for probate, in ignorance of its nature, because of fraud or mistake, it will not be admitted. However, it is not necessary for the testator to be aware of the fact that his expression constitutes a valid will. If he intends by it to convey his settled wishes concerning the disposition of his property or affairs after his death, there is sufficient testamentary intent. The testator may think that he is making a deed, or only writing a letter; yet the writing may be testamentary, and, if the formalities of due execution are fulfilled, may constitute a valid will. It must be established, however, that the expression represents testamentary decision, and is not merely notes, or a tentative draft, or the indication of a transitory, unsettled idea (8).

In some jurisdictions, if a deed or grant is delivered in escrow, with the stipulation that it shall be given the grantee upon the grantor's death, if not sooner recalled, apparently a compliance with the unrevoked order after the grantor's demise will vest good title in the grantee. The intent disclosed by such a transaction is indistinguishable from one that is testamentary. The purpose is that the instrument shall be a total nullity and at the disposal of the grantor, until his death. This is precisely the purpose of a testator and the criterion of a will.

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(7) Nichols v. Nichols, 2 Phill. 180; Fleming v. Morrison, 187 Mass. 120.

(8) In re Estate of Skerrett, 67 Cal. 585; Byer v. Hoppe, 61 Md. 206.

Therefore principle should dictate that the deed and the terms of delivery be held ineffective, unless executed in accordance with the legal requirements of valid testamentary expression; and, in most jurisdictions, this would be the result (9). On the other hand, a deed which purports to convey property at the death of the grantor, leaving a life interest in him, is not testamentary. A present transfer of a future interest is the purpose it discloses.

§ 49. **Fraud connected with lack of testamentary intent.** That fraud will vitiate a will is a common statement of text writers and judges. It is, however, but a vague indication of the truth. Fraud is a big word. It includes within its scope a multitude of different sorts of conduct, purposes, and consequences, to which this same label is attached, because they all contain the element of inducement to undesired results by misrepresentation. In what way or ways may fraud "vitiate" a will?

Suppose that X is led to sign and execute a certain writing of testamentary import, through the misrepresentation of Y that it is a document of a different sort—for instance, an order for merchandise, or a deed, or a subscription to some fund. In this case the fraud is unimportant, except as a reason for X's act. It does not make the "will" more void than it would have been, if X had acted under the same misapprehension without the fraudulent inducement. The fundamental difficulty with it is not fraud merely, but lack of testamentary intent. The writing is void because X did not intend it as testa-

(9) Kenney v. Parks, 125 Cal. 146.

mentary expression (10). Let us take another case, which does not involve fraudulent conduct, but which properly may be classified with the one just discussed. It may throw some additional light on the meaning of testamentary intent. X writes out a tentative draft for a will and then, before he executes it, changes his mind and writes another. Intending to execute this latter expression, he by mistake executes the former. This is not a will. Although it is testamentary in import and X executed it with an intent to make a will, there was a lack of sufficient testamentary intent with respect to it. X did not intend *that expression* to be his will (11). We shall have other cases analogous to this one when we come to discuss mistake, §§ 52-57, below.

§ 50. **Fraud not connected with lack of testamentary intent.** Does fraud ever "vitiate a will" which is made with proper testamentary intent? Suppose a man induces a woman to "marry" him, and she dies leaving him all or some of her property by will. It turns out that the man was married already, and knew that he was not a widower when he went through the ceremony with the testatrix. It is also clear that the decedent was not aware of the fact at any time. Can he take the legacy or devise? There is no lack of proper testamentary intent here. The testatrix intended the expression to be her will. The expression, properly construed, says that the property is to go to X, the pseudo-husband. Unless the misrepresentation vitiates the gift, it is good. The gift is voidable. It is presumed that the testatrix made it be-

(10) Fleming v. Morrison, 187 Mass. 120.

(11) Goods of Hunt, L. R. 3 P. & D. 250.

cause she supposed that there existed the legal relationship of husband and wife between X and herself. This misapprehension was due to X's false conduct, and it would be impolitic to enable him to take the fruits of his fraud (12). It is to be noticed that X's fraud does not vitiate the whole will unless it contains no other provisions than those pertaining to him. If there are other legacies or devises, or if there is a nomination of an executor other than X, these are not affected by the avoidance of the gifts to X. A case may serve to illustrate this fact, and at the same time indicate how far the vitiating effect of such a fraud extends over consequences flowing from it.

§ 51. **Same: Illustration.** One Adelaide Ward falsely represented herself to be a widow, and induced the testator to "marry" her. Adelaide Ward had a daughter, Sarah Ward, by her real husband. The testator, who continued ignorant of the facts until his death, made certain testamentary gifts to his "wife, Adelaide" and to his "step-daughter, Sarah Ward." The validity of these gifts was contested in an English court. The court held (13) that the gift to Adelaide Ward was void for the reasons indicated in the preceding subsection; but that the gift to the child, Sarah Ward, was good since she was innocent of the fraud and it could not be presumed, in the absence of sufficient evidence, that the testator gave to her because he thought she was his step-daughter. The testator knew the child personally, and it was at least equally probable that he gave to her because he was fond

(12) Kennell v. Abbott, 4 Ves. 802.
(13) Wilkinson v. Joughin, L. R. 2 Eq. 319.

of her. This case illustrates not only that a will may be partly avoided because of fraud, but also that false conduct or statements do not vitiate proper testamentary expression which is not based upon them as an essential motive, although that expression probably never would have been made had it not been for the misrepresentation. On the other hand, if a legacy or devise is based upon a false statement, made with the intent of procuring it, it makes no difference that the legatee or devisee did not participate in the fraud. It is inequitable for him to take its fruit. Therefore in a case where a woman had misrepresented to the testator that certain children were their illegitimate offspring and, *because of his consequent supposition that such a relationship existed,* he had provided for them in his will, it was held that the legacies were voidable (14).

Section 4. Mistake.

§ 52. **Mistake.** Mistakes are very common in the drawing and execution of wills. Probably there is no other sort of legal instrument which exhibits such frequent and serious blunders. Words are omitted which the testator intended to include in the executed instrument; words are interpolated which he intended to omit; through misunderstanding of language, or carelessness, or lack of circumspection and foresight, expressions are used by the testator, or the person whom he employs to draw his will, which do not express his meaning—perhaps induce some other idea, perhaps cannot be satis-

(14) Ex parte Wallop, 4 Bro. C. C. 90.

factorily interpreted at all; errors are committed concerning the formalities of due execution of the will. Let us consider these four sorts of mistake in succession and get some ideas concerning the effect of each.

§ 53. **Interpolated words.** The mere interpolation of words which the testator never adopted into his testamentary expression is usually the least serious of the four sorts of mistake mentioned in the preceding subsection. Such words form no part of the will and should not be admitted to probate. They should be stricken out by the court regardless of the effect on the meaning of what remains (15). However, no part of the expression which has been approved by the testator can be stricken out, even though such an alteration is necessary to make the will mean what the testator intended (16).

Let us have some illustrations of these statements. X dictates a will as follows: "I give all my property to my daughters." X has four daughters, Edith, Mary, Elizabeth, and Ellen. The scrivener draws up the final draft as follows: "I give all my property to my daughters, Elizabeth, Mary, and Ellen." The testator executes this expression without reading it over. At probate, the court will strike out the three names, because they are not part of the testamentary expression (17).

On the other hand, if the testator read over the draft and then approved and adopted the changed expression by executing it, no part of it could be stricken out at pro-

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(15) Morrell v. Morrell, L. R. 7 P. D. 68.

(16) Guardhouse v. Blackburn, L. R. 1 P. & D. 109; Collins v. Elstone, [1893] P. 1.

(17) Goods of Boehm, [1891] P. 247.

bate, although the evidence were sufficient to convince the court that the testator had overlooked the fact that his fourth daughter's name was omitted (18). Ordinarily a will concerning a great amount of property is not drawn up by the testator himself. He tells his lawyer in substance what dispositions he wishes to make, and the lawyer chooses the phraseology to accomplish the purposes of the testator. The testator then adopts this phraseology and executes the will. Evidence that a competent testator executed the will, with the required formalities, will raise a presumption that he knew and approved of the expression. However, if it can be established that the lawyer or his assistants have put expression into the will that the testator never adopted in any way, that expression will be stricken out, on the same principles that govern when the testator dictates the phraseology himself.

§ 54. **Omitted words.** Sometimes a will is offered for probate, and it is found that through mistake or fraud some part of the expression which was adopted or directed by the testator has been left out. The omitted words may be supplied if they were executed with the formalities required by law for valid testamentary expression (19). What the formalities are is a matter which is the subject of some of the later sections of this chapter. If the omitted words have not been duly executed, they cannot be added to the formal will (20). This

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(18) Harter v. Harter, L. R. 3 P. & D. 11.

(19) Goods of Bushell, L. R. 13 P. D. 7.

(20) Mitchell v. Gard, 3 Sw. & Tr. 75. However, the doctrine of incorporation by reference, which will be discussed in a later section,

is true irrespective of what effect the omissions have on the meaning of what appears in the writing offered for probate. The expression which has been *dictated or adopted by the testator and duly executed* will be admitted to probate as composing the will, although omissions have been made. However, if the omissions necessarily result in giving all or any part of the executed expression a substantially different meaning *and it cannot be shown that the testator adopted the changed phraseology,* the whole or part thus affected would probably be stricken out at probate; for, although the testator may have intended those words to appear in his will, he did not intend that they should appear as part of that expression, but of another expression which the omissions have prevented.

§ 55. **Entire valid testamentary expression is settled at probate.** All questions of interpolation or omission of testamentary expression should be brought up at probate of the will, for a determination of the composition of the valid testamentary expression or of a part of it, by a competent court, is conclusive for the purposes for which the determination is made, except upon appeal from the decision. No additions or subtractions can be made when the question before the court is: What is the meaning and effect of the probated will? (21).

§ 56. **Mistake in choice of phraseology.** That a competent testator mistook the meaning of the testamentary

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sometimes justifies the addition of writing not present at the formal execution but referred to in the formally executed expression as part of the will. See § 88, below.

(21) Guardhouse v. Blackburn, L. R. 1 P. & D. 109.

language, which he dictated or adopted, affords no ground for striking it out at probate, in the absence of a finding of fraud or undue influence. A failure of a testator and his lawyer to divine what expression will be necessary to carry out his wishes, or what construction the courts will place upon his duly executed will, cannot be remedied in any way after his death. The courts will construe his will in the light of the circumstances under which it was made, and proceed accordingly. In doing so they will not take into account any testamentary expression of the testator, other than the probated will, except in a few peculiar cases which we need not consider here (22). If the court cannot decide upon an intelligible interpretation of a probated will or a part of the will, it is void pro tanto.

Let us have illustrations of these points. Suppose that a testator, owning lands in fee simple and having a lease for ninety-nine years on other land, tells his attorney to draw up a will "giving all my interests in land, including my leasehold interest, to my son John," etc. The attorney writes this clause of the document as follows:—"All my real property I devise to my son John." Nothing is said in the will about the leasehold interest. The testator, after reading over the will, duly executes it. The attorney and the testator both assume that "real property" covers the leasehold. The will as drawn up and executed is admitted to probate, and the statements to the attorney are barred because not duly executed, though testamen-

(22) Brown v. Selwin, Cas. temp. Talb. 240; Iddings v. Iddings, 7 S. & R. 111; Chappel v. Avery, 6 Conn. 31; McAllister v. Butterfield, 31 Ind. 25.

tary. At construction of the will no attention will be paid to the statements to the attorney, because they are testamentary expressions which form no part of the probated will. Therefore, the leasehold interest, which is personal and not real property, will not go to the son under the devise. Now assume that a testator owning several pieces of land says to his son, "I want you to have my X lot when I die," and later draws up and duly executes a will containing the following clause: "I give my son James a certain lot of land which we have agreed upon." Again, only the duly executed expression is entitled to probate. This expression does not clearly determine what lot is given to James. At construction of the probated will, the oral statement of the testator to his son cannot be considered, although it is impliedly referred to in the will, because it is testamentary expression not duly executed. Therefore the devise to James fails (23).

§ 57. **Mistakes in execution.** If the formalities required by law for the execution of valid testamentary expression are not complied with, the defect cannot be remedied after the testator's death. Any expression which does not meet the requirements is void. What the requirements are is a question with which subsequent sections of this chapter deal (24).

Section 5. Testamentary Capacity.

§ 58. **Mental capacity.** A fundamental necessity for a valid will is that the testator, at the time of execution, shall be mentally in a condition to know what he is doing,

(23) Est. of Young, 123 Cal. 337.
(24) Goods of Gunstan, 7 P. D. 102.

to appreciate the purpose of the instrument, and to decide concerning the disposition of his property and affairs, without the bias of hallucinations or insane delusions. Insanity is not a bar to testamentary capacity if it does not induce or affect the particular testamentary disposition in question. Accordingly, an idiot cannot become a testator; but an imbecile or a lunatic may, whenever his weakness or aberration of mind is not such as to prevent him from making a personal decision concerning the disposition of his property, with understanding of its import, or from grasping and retaining a sane idea of the conditions of his affairs, and of his relations to the members of his family and the beneficiaries of his will.

Incapacity for business does not entail testamentary incapacity. A foolish will, a whimsical will, an unreasonable will, may nevertheless be valid. A spendthrift, a profligate, or a person of poor judgment is not therefore incapable of giving his or her property by a duly executed will to whomsoever he or she pleases. The unreasonableness or folly of a will may be important as cumulative or supplementary evidence of lack of sufficient mental capacity to make a sane decision, or of the operation of fraud or undue influence to secure its execution; but it does not vitiate the will of itself (25).

§ 59. **Physical capacity.** If sufficient mental capacity exists, neither blindness, deafness, dumbness, nor any other physical defect is a bar to testamentary capacity, un-

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(25) Whitney v. Twombly, 136 Mass. 145; Campbell v. Campbell, 130 Ill. 466; Baumister v. Baumister, 45 N. J. Eq. 702.

less it prevents sufficient expression or a compliance with the requirements for due execution of the will (26).

§ 60. **Infancy.** It is evident that a very young child has not the mental capacity to make a will. But, aside from any question of mental capacity, there is an arbitrary legal requirement in all our states and territories that a testator or testatrix shall be of a certain age at the time of execution of the will. This age varies in the different jurisdictions. In many a greater age is required of males than of females. In some the minimum age in the case of a will of personal property is lower than in the case of a will of real property. The most common ages specified are twenty-one and the age of attaining legal majority, which for females is in some states less than twenty-one. In most states legal majority, at least, must be reached by a maker of a will of either real or personal property. In some jurisdictions marriage of a person under the prescribed age removes the disqualifications.

§ 61. **Married women.** In most jurisdictions of the United States a married adult woman can make a valid will concerning her separate property in the same manner as can a man or an unmarried adult female (27); but in some of these jurisdictions the property which a wife can dispose of by will is specially limited; and in a few jurisdictions the formal consent of the husband is necessary to make the will effective, either with respect to a

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(26) Goods of Piercy, 1 Rob. Ecc. 278.

(27) Starr & Curt. Stat. Ill. 1896, ch. 148, sec. 1.

specified kind of property, or with respect to a specified portion of the property, or at all (28).

§ 62. **Alienage.** Alienage generally is not a bar to testamentary disposition of chattels or other "movable" personal property. It is a bar, however, to making an unimpeachable devise of land in many jurisdictions, for the state may take the land away from the devisee by proper proceedings. In many states, however, the common law disability of aliens to hold land, or to give or transmit a good title to land by devise or through intestate succession, has been either abolished entirely or considerably modified.

§ 63. **Crime.** Generally crime does not destroy the testamentary capacity of the criminal. However, in some states a person convicted and sentenced to state prison cannot devise or bequeath his property (29).

Section 6. Undue Influence.

§ 64. **Undue influence.** Although a testator was sound in mind and memory at the time he executed his "will," he may have been so coerced or importuned by those about him, as to execute the expression, not to indicate his testamentary wishes, but merely to escape pressure or to satisfy a feeling of compulsion. A "will" made under such circumstances is said to have been procured by "undue influence," and is invalid. However, arguments and entreaties, which induce a testator to make a will against his judgment or preference, do not necessarily constitute undue influence. If a person voluntarily

(28) Coleman v. Wood, 108 Va. 457.
(29) Est. of Donnelly, 125 Cal. 417.

decides to use a certain expression for the purpose of making testamentary dispositions, for whatever reasons, and duly executes it, neither the fact that it is in accordance with the insistent demands of those about him nor the fact that he would have preferred to make some other disposition of his property, if he had been left to himself, will render the will void. A will that is void because of undue influence of this sort is void because it is not the testamentary expression of the "testator," but expression made by him without testamentary intent, or foisted on him by someone else and executed by the "testator" only in form (30). Therefore, if the testator is persuaded by the tears and entreaties of his wife to leave the bulk of his property to her, and to deprive his minor children by a former marriage of sufficient means of support, the disposition is not void because of undue influence, although it appear that the testator would have chosen rather to apportion the property between wife and children. On the other hand, if children so harass a man on his deathbed with their conflicting demands, that he finally tells them to agree among themselves, and afterwards executes a will in accordance with the agreement of a majority, not because he desires or decides to dispose of his property in the manner specified, but professedly only because he wants to be left to die in peace, the will is void because of undue influence. Bad influence is not necessarily "undue influence." If a testator is so enamored of a designing mistress as to devise and bequeath all of his property to her at her request, leav-

(30) Hall v. Hall, L. R. 1 P. & D. 481; Wingrove v. Wingrove, 11 P. & D. 81.

ing his family unsatisfactorily provided for, the will is not for that reason invalid if it represents his testamentary decision (31).

§ 65. Improper use of fiduciary position. If a guardian, attorney, or other fiduciary obligor of the testator obtains a legacy or devise by misuse of his fiduciary influence, or by any other abuse of his fiduciary position, the gift will be set aside by the courts. For instance, if a guardian encourages his ward in spendthrift habits in order to get into the good graces of the ward, and thus induces a legacy in his favor in the ward's will, he cannot take the gift if opposition to it is raised in court (32). In some jurisdictions, apparently, a fiduciary obligor of the testator cannot take a testamentary gift which he has been active in procuring, although his means have been free from viciousness, fraud, or unfairness (33). Testamentary gifts which are held voidable for reasons touched upon in this subsection also may be said to have been obtained through undue influence; but it is to be noticed that the cases falling here differ from those which we have considered just previously, in that sufficient testamentary capacity and testamentary decision may have been behind the gifts falling under this subsection, and yet they are vitiated by the improper use of a fiduciary relationship.

Section 7. Execution of Wills.

§ 66. Reason for requiring technical execution of wills. In order to minimize the chances for fraud and to

(31) In re Ruffino, 116 Cal. 304.
(32) Morris v. Stokes, 21 Ga. 552.
(33) Meek v. Perry, 36 Miss. 190.

contribute to certainty in the ascertainment of the fact of testamentary expression and its content, the law of our states and territories prescribes certain varying formalities as requisites for a valid will. If these requirements are not complied with by a testator, his will is ineffective. Therefore, knowledge of what these technical formalities are is of the utmost practical importance to anyone who has the direction of the execution of a testament. In most of our jurisdictions several forms of wills are recognized by the courts; but generally all, except the holographic will and the written and formally attested will, are valid for only limited purposes. Let us first learn something concerning these other types of wills and then take up the requirements for a valid written attested will and for a holographic will.

§ 67. **Unattested written non-holographic wills.** In some few jurisdictions a will of personal property is good if it is reduced to writing at the direction of the testator during his lifetime, and signed by him personally, or by someone for him in his presence and at his direction. In some of these jurisdictions the signature is unnecessary (34). In most jurisdictions, however, a will of personal property, other than nuncupative will, must conform to the same requirements as a will of realty (35).

§ 68. **Nuncupative wills.** In most of our jurisdictions nuncupative or oral wills of personal property, made before witnesses, are good within varying limitations, if executed with formalities which also vary in the different jurisdictions. The limitations and formalities are usually

(34) Franklin v. Franklin, 90 Tenn. 44.

(35) Cal. Civ. Code, § 1276.

prescribed by statute; but in some states the statutory formalities are not required, if the will does not concern property of more than a certain small value. In some jurisdictions the amount of property which can be covered by a nuncupative will is limited by a specified maximum value—for instance $1,000 in California; $200 in Delaware. Generally, only mariners and soldiers in active service, and persons in contemplation of impending death, can make valid nuncupative wills; and in some jurisdictions only soldiers and sailors in actual service can make them. The formalities generally include a certain minimum number of witnesses, of whom a certain number must be asked by the testator to act in that capacity. The testator must declare his will before the witnesses. Usually it is provided that the will must be reduced to writing and probated within certain short periods after making; or that it must be probated within a certain time, if not reduced to writing within a certain lesser period. It is provided by a number of the statutes that, except in the case of mariners and soldiers in actual service, the will must be made in the dwelling house of the deceased, wherein he has resided for a certain number of days before the execution of the will, unless he has been "surprised or taken sick" away from home and dies before returning to his dwelling. We need not go further into the variant details of the provisions in the different states and territories. This fragmentary outline will give us a general idea of the nature and scope of a nuncupative will (36)

(36) Cal. Civ. Code, §§ 1288-1291.

§ 69. **Undesirability of oral and informal non-holographic written wills.** It is not advisable to make a nuncupative or a non-holographic, unattested, written will, if some other can be accomplished, even where these sorts are valid. There are many chances for fraud or for mistake on the part of those who commit the will to writing, or give testimony of its content; the expression is likely to be less careful, clear, and comprehensive, than in the case of an attested will or of a holograph; and in the case of a nuncupative will the courts require proof of strict performance of all the statutory requirements. In addition there is the obvious disadvantage of the limited scope of such wills. They should be used within their limited field only as emergency instruments.

§ 70. **Holographic wills.** A holographic will is one in the handwriting of the testator. In many jurisdictions a will is sufficiently executed for all purposes if *entirely* written, signed, and dated in the handwriting of the testator. In some, a date is not necessary. Where it is required, it must be *entirely written.* If part of it is printed or typewritten, the whole will is invalid as a holograph. For instance, if the will is written on a blank, with a line at the top for the date, and the first two numerals of the year are printed, the testator cannot write the date within the meaning of the statute and employ these two printed numerals (37). He must himself write the whole date which he uses; and the date must show the day of the month as well as the year. The signature need not be at the end of the will, unless the statute spe-

(37) Est. of Billings, 64 Cal. 427. Compare Est. of Larkemeyer, 135 Cal. 28.

cifically requires it to be there (38). The testator's name at the beginning or in the body of the will may be treated as a signature, if he so intended; and if it is shown that he evidently considered the document to be completely executed, there will be a presumption that his name in such a position was intended as the signature. In all cases, however, prudence dictates that the will should be signed in the usual manner at the end (39). In one or two jurisdictions there are requirements that a holograph be found among the valuable papers of the deceased, or lodged with some person for safe keeping, in order to be valid; and that the handwriting be proven to be the testator's by a certain number of witnesses—for instance, three in North Carolina (40).

§ 71. **Same: Advantages and disadvantages.** The great advantages of a holograph are the simplicity of proper execution and the comparative security against fraudulent alterations afforded by it. However, a holograph should be drawn with as much care as any other type of will; and it should contain a clear statement of its testamentary character and final execution, in order that possibility of dispute over a question whether it is a will, or a mere tentative draft, or perhaps only a memorandum, may be barred. The only practical objection to a holographic will, aside from the labor of execution, seems to be that it is not valid in all jurisdictions. The testator may have property in many jurisdictions at the time of

(38) Est. of Stratton, 112 Cal. 513.

(39) For typical statutory provisions concerning holographic wills see Cal. Civ. Code, § 1277.

(40) Brown v. Eaton, 91 N. C. 26.

his decease. In order to cover effectively all his land in the different jurisdictions, the will must comply with all the different requirements. It may be that only an attested will will be sufficient for this purpose. An attested will should, however, be written entirely in the handwriting of the testator and signed and dated in his handwriting wherever practicable, because of the marks of authenticity and the difficulty of fraudulent alteration incident to a holograph, and because, if through some mistake in the formal execution the will should fail as an attested instrument, it might in some jurisdictions be supported as a holograph.

§ 72. **Formally attested will the usual type.** The usual will today is a formally attested, written, typewritten, or printed document. Everywhere in the United States "a writing" is required to devise realty. In most states the requirements for wills of personalty, other than nuncupative wills, are the same as for wills of realty. In the following subsections we shall attempt to secure some general idea of the nature of the ordinary varying requirements for a good attested will, generally paying no attention to peculiar departures from the more common statutory requirements.

§ 73. **Making of signature.** The will must be signed, unless, in one or two states only, the testator is prevented from signing by the extremity of his sickness, and this is proven by the oaths of a certain number of competent witnesses. Generally the signature may be the testator's name written by himself, either with or without the guiding assistance of another, or his mark clearly in-

tended as a signature, or, in most jurisdictions, his name written by someone else at the testator's request and in his presence. The law of some states, for instance California (41), demands that if the testator signs by mark a witness to the signing shall write the testator's name near the mark and sign his own name as witness to the mark. It is also directed by some statutes that one who signs the will in the name of the testator, at his request and in his presence, shall also sign as witness *to the will*; but in some of these states it is provided that a failure to do this shall not invalidate the will, if it is attested by a sufficient number of other witnesses in the proper manner.

§ 74. **Place of signature.** The signature properly may be placed in any part of the will in many jurisdictions, for instance, a signature in the usual exordium, as "I, John Jones, being of sound mind and memory, do make" etc., will be sufficient. However, the name so appearing must be intended as a signature, or it will not be given that effect. In some states the requirement is that a will shall be "subscribed" or "signed at the end." Such provisions have raised litigation over the question, what is meant by the end of the will? A testator, for instance, writes his will on paper folded once to make four pages. He begins it on the first page, continues on the fourth page, then goes back to the second page, and ends on the third page, numbering the pages however, according to the sequence of his writing. Where shall he sign in order to satisfy the statute? If he signs at the end of his writing on page three, he will not satisfy the law of New

(41) In re Gullfoyle, 96 Cal. 598.

York at least (42), because there is writing on the pages following in natural order after that on which the signature appears. Clearly, if testamentary expression follows the signature in logical sequence, as well as according to the natural paging, the signature is not "at the end of the will" or "subscribed." In some of the states which have such a requirement, a signing at the end of the expression on the third page would probably be held as a sufficient subscription. However, the safest course is to write the will in the natural order of paging and to sign under the end of the testamentary expression. The attestation clause and signatures of the witnesses may follow the testator's subscription without invalidating it, under such a statutory provision as the one which we have been considering.

§ 75. **Seal.** A seal is not necessary to a valid will except in one or two states.

§ 76. **Date of will.** It is not necessary to date a will unless the statute of the particular jurisdiction expressly requires it, as for instance, in California and other states in the case of a holographic will; nor need the place of execution be stated. However, it is wise to state both facts, as the validity of a will in certain or all particulars sometimes turns upon its date or the state of execution, and there may be no other available evidence of these facts at probate.

§ 77. **Attesting witnesses.** A certain number of witnesses, in most jurisdictions two or three, must watch the testator sign; or, in some jurisdictions, in the alternative,

(42) Matter of Andrews, 162 N. Y. 1. See also Est. of Seaman, 146 Cal. 700; Morrow's Est. (No. 1), 204 Pa. 479.

hear or see his acknowledgment of a signature previously made; or, in some jurisdictions, merely witness an acknowledgment of the will by the testator, without seeing either signing or signature. In some jurisdictions the testator may sign or acknowledge in the presence of each witness separately; in others he must sign or acknowledge in the presence of all together.

§ 78. **Publication of will.** In some jurisdictions it is not necessary that the witnesses be given any indication of the character of the document which they are attesting. In some, however, the testator is required to "publish" the will to the attesting witnesses. Publication consists in any open expression by words or acts of the fact that the instrument is the testator's will. In some jurisdictions publication may be made to each witness separately; in some it must be made to all together. Generally, it must take place at the same time as attestation of the signature.

§ 79. **Whole will should be present at execution.** The entire document which is to be attested should be present and in view of the witnesses at the time of execution and attestation, although it is not essential that the witnesses actually see it all. It is prudent, however, to point out all the sheets to them, and also to have the sheets permanently bound together in their proper order. Any writing not present at the execution and attestation is not part of the valid will, unless it is otherwise duly executed or is incorporated by reference, in accordance with a principle discussed below (43).

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(43) See § 88, below.

§ 80. **Signing of attesting witnesses.** In most, but not in all jurisdictions, the attesting witnesses are required to sign the will. The signature of the testator or his acknowledgment thereof and the publication of the will should all be made before the witnesses sign; and in some states it is essential that this order be observed (44). In some jurisdictions it is not *necessary* that the testator sign before the witnesses do, if all the signatures are appended at about the same time and as a part of the same transaction (45); and likewise, in some, a publication made a few moments after the witnesses have signed and while they are yet present will be good (46). In some jurisdictions the witnesses are required to subscribe the will. In the absence of a provision to this or a similar effect, their signatures may be placed anywhere about the testamentary expression. A requirement that they subscribe or sign at the end, however, calls for a signature in a position like that of the testator's signature under the similar statutory provision discussed in § 74 above. The witnesses can sign by mark in some jurisdictions. In some, however, it is expressly provided that they shall sign their names. In some jurisdictions the testator must ask the witnesses to attest the execution.

§ 81. **What is "in the presence of the testator?"** In many jurisdictions it is required that the witnesses sign "in the presence of the testator." A good deal of litigation has turned on the meaning of these words. It is

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(44) Lacey v. Dobbs, 63 N. J. Eq. 325.

(45) Swift v. Wiley, 1 B. Mon. 114. See also Gibson v. Nelson, 181 Ill. 122.

(46) Est. of Johnson, 57 Cal. 529.

clear that the testator must know that the attestation and signing is going on. According to the weight of authority it is not essential, although of course it is prudent, that he actually see the operation (47). It is not necessary that it be carried on in the room that contains the testator. However, it is necessary that it be carried on in such a spot that the testator could by turning his head or by some other slight movement see the operation (48). It must in no way be concealed from him, whether intentionally or through oversight. If the testator would have to stretch his neck about the jamb of an open door at the head of his bed to see what is going on, the signing is not in his presence (49); nor is it, if carried on without any idea of concealment behind the solid bedhead itself (50). On the other hand, a signing in the next room at a spot within clear view of the testator is in his presence (51). To avoid all possibility of difficulty on this score, the testator should actually look on while the witnesses write their names. Probably if the testator is blind, it is sufficient to have the signing done in a spot that would be within his view could he see (52). The witnesses must *sign* in the presence of the testator. An acknowledgment in his presence of a signature previously made during his absence will not satisfy the requirement. In some states it is required that the wit-

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(47) Riggs v. Riggs, 135 Mass. 238.

(48) Tribe v. Tribe, 1 Rob. Ecc. 775.

(49) Norton v. Bazett, Deane, 259; Graham v. Graham, 10 Ired. (N. C.) 219.

(50) Brooks v. Duffell, 23 Ga. 441.

(51) Shires v. Glascock, 2 Salk. 688.

(52) Goods of Piercy, 1 Rob. Eccl. 278.

nesses sign in the presence of each other as well as in the presence of the testator. This phrase receives a similar construction. Where such a requirement exists especial care should be taken to have all the witnesses in a position to see the signing of each, and to have them attentive to the operation.

§ 82. **Attestation clause.** It is usual but not necessary to append an attestation clause to the will, just before the space for the signatures of the witnesses. This is a wise thing to do. It may happen that no other evidence of due execution of the will than proof of the signatures of the witnesses can be obtained at probate. It has been held that an attestation clause, signed by the witnesses whose signatures are proven, is *prima facie* evidence of the facts of execution which it states. Therefore, an attestation clause should declare all the essential facts of due execution of a valid will. For instance, it should state that the testator was known to the witnesses to be of sound mind and memory when the will was executed; that he signed or acknowledged his signature in their joint presence; that he published the will in their joint presence; that he requested the witnesses to attest his signature and the publication and execution of the will, and to subscribe it; and that they do so in his presence and in the presence of each other. The attestation clause should, of course, make no statements contrary to the facts that occurred. If the statements it contains are erroneous in essential particulars, that may be established by other evidence at probate. An erroneous attestation clause will not, however, invalidate a will which has been duly executed.

§ 83. **Statement of place of residence of witnesses.** By the statutes of some states it is required that the attesting witnesses affix a statement of their places of residence to their signatures. A failure to comply with this provision does not invalidate the will, but in some states will expose an offending witness to a liability for damages suffered through his neglect or to a penalty.

§ 84. **Competency of attesting witnesses.** Obviously a person who has not sufficient mental capacity is incompetent to be an attesting witness. There are also other disqualifications. In some states a child below a certain age—for instance, ten years—cannot be a good witness. In some states the husband or wife of the person making the will is incompetent. Persons who have a direct beneficial interest in supporting the will, and their wives and husbands, are also incompetent as attesting witnesses in many states, with the following qualifications and exceptions.

Probably in all jurisdictions, creditors for the payment of whose debts provision is made in the will are nevertheless competent (53). In most jurisdictions a person indicated as a legatee or devisee is not incompetent, but the legacy or devise, or so much in value as exceeds what the person would have taken by intestate succession, is void. In some jurisdictions a legacy or devise to the wife or husband of an attesting witness is void, and the witness is competent. It is generally provided by statute, or held without the aid of a statute, that if there are a sufficient number of competent non-interested attesting

(53) See Cal. Civ. Code, § 1282.

witnesses, without counting a legatee or devisee who has also attested, the whole will including the legacy or devise is good. It is obvious from this survey, that witnesses should be chosen from among persons who are entirely disinterested in the will, and are not nearly related to the testator.

§ 85. **Wills in Louisiana.** The jurisprudence of Louisiana is based upon the civil instead of the common law. It results from this fact that the testamentary law of Louisiana differs considerably from that of our other states. In this subsection is a brief summary of the formalities requisite for executing the different sorts of wills recognized by the law of that state (54).

Wills are divided into three classes: nuncupative or open, mystic or sealed, and olographic. An olographic will is one written, dated, and signed entirely by the hand of the testator. It is valid without any further formalities.

A nuncupative will may be made either before a notary public, or "by act under private signature." If made before a notary public, it is dictated to the notary, who writes it down and then reads it to the testator, in the presence of three witnesses resident in the parish where the will is executed, or of five witnesses from without the parish. The testator then signs, or, if he is unable to sign, express mention is made in the document of this fact and of the reason why he cannot sign. The testament is then signed by the witnesses, or by one of them at least for all, if the others cannot write. A nuncupative will

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(54) See La. Civ. Code, 1870, §§ 1571-1604.

"under private signature" is made as follows: The testator or someone else at his dictation writes the will in the presence of three witnesses resident in, or of five witnesses residing out of, the place where the will is made; or the testator presents and publishes to these witnesses a will which has been written by himself or by someone else at his dictation, out of their presence. Then the witnesses read the will, or one reads it to the rest in the presence of the testator, and the testator and the witnesses sign their names if they are able. At least two of the witnesses must sign their names, and the others who are unable to do so must affix their marks.

A mystic testament is made as follows: The testator signs the written expression and presents it closed and sealed to a notary, in the presence of seven witnesses, or closes and seals it in the presence of the notary and witnesses. He must then declare to the notary, in the presence of the witnesses, that the paper contains his will, and that it has been written by him or by another at his direction and has been signed by him. The notary then draws up a superscription on the envelope or wrapper, stating the facts of execution, and this is signed by the testator, the notary, and the witnesses. All this must be done continuously and without interruption from other matters. If the testator cannot sign his name to the superscription, because of some accident which occurred since he signed the testament, the notary must mention his declaration to that effect in the superscription. If a testator is unable at all times to write or sign his name, he is not competent to make a mystic will. If any of the witnesses cannot sign, mention must be made of that fact

in the superscription. At least two of the witnesses must sign their names.

There are special provisions also for wills made during a voyage or by a person in active military service. These are to be effective only for a limited time. We need not notice them particularly here. Also, a testament will be valid in Louisiana, if executed in a foreign country or another state or territory of the Union, according to the requirements of the jurisdiction where it is made.

§ 86. **Competency of attesting witnesses to Louisiana wills.** The following classes of persons are incompetent as attesting witnesses according to the law of Louisiana: All women; all male children under sixteen years of age; insane persons and those who are deaf, dumb, or blind; and those whom the criminal laws declare incapable of exercising civil functions. Those who are named as heirs or legatees in any but a mystic will also cannot be good attesting witnesses to that will (55).

§ 87. **How can a will of the most extensive validity best be drawn?** This question may be answered briefly, as follows, premising that no will of any importance should be executed without the aid of a competent lawyer.

A simple, clear, straightforward and orderly statement of the wishes of the testator should first be drawn up, and amended and corrected until it meets with critical approval. Then the testator should carefully copy and date this approved expression in ink, on one side of successively numbered sheets of white paper, without erasures, interlineations, or cancellations. Then three witnesses, not

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(55) La. Civ. Code, 1870, §§ 1591-1592.

in any way interested in the will nor members of the testator's immediate family, but persons who are well acquainted with him and who can write, should be called in. The will, bound permanently together in proper order, should be called to the attention of the three witnesses together by the testator, and he should tell them that it is his will and that he wishes them to attest it and his signature. Then he should sign just under the last word of the testamentary expression and affix a seal after his signature, while the three witnesses watch him. Then the witnesses, at the request of the testator, should in turn append their names and places of residence to the attestation clause just under the testator's signature, each signing being watched by the testator and the other two witnesses. The proper contents of the attestation clause have already been detailed.

A will drawn carefully in this manner would be good as to form all over the United States, unless executed in Louisiana. If executed there, it should, in addition to the above formalities, be read to the three witnesses together.

§ 88. **Incorporation by reference.** There is one apparent exception to the rule that testamentary expression must be duly executed to be valid. If an extrinsic writing in existence at the time the will is executed is referred to in the will unequivocably, so that a court could ascertain it without the aid of any other indicatory expression of the testator than that included in the will, and the will indicates that the testator wishes this extrinsic writing to be read as part of it, the extrinsic writing may be considered as incorporated into the duly executed document. The writing must be in existence and conform to

the full terms of the description in the reference, at the time the will is executed, however. A moment after execution is too late (56). Although it is possible within these narrow limits to incorporate extrinsic writing into a will, it is advisable to avoid doing so wherever practicable, and to express clearly, fully, and completely in the will itself the testamentary wishes of the maker.

§ 89. **Validation of defectively executed wills by reference.** An important effect of the doctrine of incorporation by reference is the validation of defectively executed wills, under certain circumstances, by a subsequent validly executed testamentary expression which purports to be a codicil. A codicil is a sort of amendment to a will, adding to or subtracting from it, or altering it in some other way. A codicil consists of testamentary expression, and must be duly executed in the same manner as an original will. If a testator makes a will and defectively executes it, and then later duly executes what is intended as a codicil, in which he expressly or impliedly refers without equivocation to the invalid will, it is incorporated by reference, and thus validated with the alterations made by the codicil (57).

Section 8. Amendment, Revocation, and Nullification of Wills.

§ 90. **Amendment of wills.** A testator voluntarily may change the sum of his valid testamentary expression in any of various ways. (a) He may make a codicil to

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(56) Bryan's Appeal, 77 Conn. 240; Allen v. Maddock, 11 Moo. P. C. 427; Goods of Smart, [1902] P. 238.

(57) Allen v. Maddock, 11 Moo. P. C. 427.

his will. (b) He may make a new will superseding entirely or in part his old will. (c) He may revoke all or part of his will, in other ways which we shall indicate later.

Before we go further let us state a fundamental principle which must be borne in mind throughout the consideration of this part of our subject. A testator cannot add anything to his duly executed testamentary expression, without a due execution of the added expression. Without the requisite due execution the added expression is ineffective. *Nullification* of a will or a part of a will may be accomplished in various ways; but *addition* of expression demands the same sort of formalities as would have been necessary to make the added expression part of the testator's will in the first place (58). Therefore, if, after a will has been duly executed with the aid of attesting witnesses, the testator adds a postscript or makes an interlineation, this new writing is void, unless it can be sustained as a holographic codicil or the formalities of attested execution are repeated. Nullification of testamentary expression by substitution of other testamentary expression can be accomplished then, only by a duly executed will or codicil. In so far as a subsequent will or codicil is inconsistent in its terms with a prior will or codicil, the prior document is revoked. A will or codicil, or a writing executed with the formalities requisite for due execution of a will, may also be used *expressly* to revoke existing testamentary expression, totally or in part. There are, however, several additional less formal means

(58) In re Knapen's Will, 75 Vt. 146.

of nullification open to a testator. Let us see what they are.

§ 91. **Informal means of revocation.** These other effective means of expressing revocatory intent vary in different jurisdictions. The acts ordinarily specified are: (a) cancelling; (b) obliterating; (c) burning; (d) tearing; (e) otherwise destroying. Not all of these methods are permitted in all the states, and there are differences in the particulars of the respective acts in different states.

§ 92. **Cancelling.** To cancel means, practically, to draw lines over. It is not necessary to cross out each individual word of the revoked expression. If the extent of the lines indicates the scope of the revocatory intent, it may be fully accomplished. Two lines drawn crisscross from the corners of a page of the will would be an effective cancellation of the entire expression on that page; and a cancellation of the signature to a will would be a sufficient means of revoking the whole will, if that were the intent. According to some authority, the lines need not be on the face of the writing; they may be on the blank back of the paper. They must be intended as cancellation marks, however (59).

Writing the word "cancelled" at the bottom of a sheet of paper containing a brief will on its upper half would not constitute a cancelling, within the usual statutory significance of the term in this connection. The word would be intended as an indication that the writer considered the will void, but it would not be a marking out of the physical words of the testamentary expression, and

(59) Warner v. Warner, 37 Vt. 356; Townshend v. Howard, 86 Me. 285.

therefore not a satisfaction of this formal requirement of the statute (60).

§ 93. **Same: Cannot create new testamentary gift.** Generally a part or all of a will may be revoked by cancellation, but the testator cannot create new testamentary gifts by a judicious cancellation of some of the writing of his will, without subsequently duly re-executing it. For instance, if the disposing part of a duly executed will reads: "I leave nothing to my son Frank. To my son John and my daughter Fanny I leave all my property absolutely," the testator could not, after a change of heart, leave his property to all his children equally, simply by crossing out words so that those remaining would read: "To my son Frank, my son John and my daughter Fanny, I leave all my property absolutely." To permit this would be to permit the making of new testamentary expression without due execution. The cancellation would not be used solely for the purpose of revocation. The changed expression that Frank should share in the property would be absolutely void. It could not be considered as part of the testator's will because not duly executed. Therefore the rest of the unrevoked expression alone would compose the will, with the result that John and Fanny would take all the property (61).

In some jurisdictions cancellation cannot be used as a means of revoking part only of a will. In some, cancellation of part of a will is not effective unless executed with the formalities required to make a good will, and, in one

(60) Ladd's Will, 60 Wisc. 187.

(61) Pringle v. M'Pherson, 2 Brev. (S. C.) 279.

jurisdiction at least, the same is true of cancellation of the whole will (62).

§ 94. **Obliterating.** Obliterating consists of making written expression illegible. This may be done either by erasing or by blotting out. The preceding remarks on cancellation are applicable to obliteration with these exceptions: No part of the testamentary expression is revoked by obliteration, unless it itself, or the signature of the testator, or some other word or mark essential to the valid execution of the will, is actually obliterated. In the states where revocation of a part of a will by cancellation is impossible, or requires additional formalities, this is not true of revocation by obliteration.

§ 95. **Burning or tearing.** Burning naturally is adapted rather to total than to partial revocation; but both it and tearing may conceivably be used for partial revocation also, unless the terms of the statute prohibit. It is not necessary to destroy the will to effect revocation by burning or tearing. Indeed the slightest burning or tearing of any portion of the testamentary expression would be sufficient, if done with intent to revoke the whole will. Tearing off the signature has been a means of revocation frequently adopted by testators, and is effective wherever tearing is a statutory means of revocation (63).

§ 96. **Otherwise destroying.** "Otherwise destroying" is an omnibus term employed in some of the statutes to include all means of doing away with papers, which impair their entirety, and which might not fall under the special sorts of destruction which we have been consider-

(62) Gay v. Gay, 60 Ia. 415.

(63) Bibb v. Thomas, 2 W. Bl. 1043; Hobbs v. Knight, 1 Curt. 768.

ing. For instance, cutting the testamentary expression, or cutting the signature of the testator, or the names of the witnesses, would fall under the category of "otherwise destroying," if they did not fall under "tearing" (64).

§ 97. **Can the testator destroy testamentary expression by an agent?** Suppose the testator does not himself cancel, obliterate, burn, tear, or otherwise destroy his testamentary expression, but directs another to do so. Will the act be effective, if done by this appointed agent? Generally provision is made by the statutes for giving effect to these acts, if done by a person *at the request of the testator and in his presence.* In some jurisdictions two witnesses to the testators' request are also required (65).

§ 98. **Necessity of intent to revoke.** It is an essential of revocation that there be an expression of intent to revoke. Unless the courts should determine that the testator had decided to recall the testamentary expression in question, the total destruction of the will by him would not constitute a revocation. This is a fact that should be carefully borne in mind, for, in many cases, a testamentary document has been destroyed by mistake or accident, or through the unauthorized act of another, and yet the expression which it contains may be proved in court as the last will of the testator (66). This is generally true. However, in some jurisdictions, there is a statutory provision that the contents of a destroyed will

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(64) Price v. Powell, 3 H. & N. 341.

(65) Cal. Civ. Code, §§ 1292-1293.

(66) James v. Shrimpton, 1 P. D. 431; Sugden v. Lord St. Leonards, L. R. 1 P. D. 154.

cannot be proved, unless it is shown that it was destroyed after the death of the testator; or, in some of these states, unless it was fraudulently destroyed during his lifetime (67).

§ 99. **Necessity of expression of intent to revoke.** It is also necessary to revocation that there be an expression of the intent to revoke in one of the forms required by statute. It makes no difference what caused the failure to comply with the statutory requirements. For instance, if a testator throws his will into an open grate with the intent to destroy it, but it falls on dead coals and is taken away surreptitiously by another, before any part of it catches fire, and is concealed from the testator, there is no revocation by burning (68). Again, if a testator tears up a paper, under the mistaken impression that it is his will, there is no revocation by tearing. This is so, even though a beneficiary of the testator's will has secretly exchanged the two papers to prevent revocation. However, where fraudulent measures are used to prevent a revocation, the persons in whose behalf the fraud is exercised will not be permitted to take a benefit given them by the will (69).

§ 100. **Testamentary capacity is necessary to revocation.** In order that the testamentary expressions of revocation be effective, of course it is necessary that the testator be at the time mentally and otherwise competent to be a testator, and that his act be not the product of undue influence or fraud, of a sort which would prevent

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(67) Cal. Code Civ. Proc. §§ 1338-1339.

(68) Doe v. Harris, 6 A. & E. 209; Graham v. Birch, 47 Minn. 171.

(69) Ellerson v. Wescott, 148 N. Y. 149.

the existence of the proper revocatory intent. The same principles apply as in the case of the making of a will.

§ 101. **Best method of revocation.** The best method of revocation is an expression of the intent in a document executed with the formalities required for due execution of a will. Especially is this true if partial revocation only is desired. If total nullification is wished, a formal revocation by duly executed writing should be accompanied by destruction of the discarded will.

§ 102. **Effect of mistake upon revocation.** To repeat something that was said above (§ 99), before a court can find that a will has been revoked, it must be established that the testator expressed an intention to revoke in some one of the forms required by law. The form must be the expression of the final determination of revocation. If a proper expression of an intent to revoke is found, it makes no difference that the testator has acted under some mistake in making up his mind to revoke his will (70). The testator may think a legatee is dead and revoke the legacy for that reason. The legacy stands revoked in spite of the mistake (71). If the testator, however, should cancel the words giving the legacy, expressing at the time that he did so because he considered them useless, there would be no revocation of the legacy, because of lack of intent to revoke (72). There is an English case which illustrates this distinction (73).

A testator made a will containing the following clause:

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(70) Skipwith v. Cabell, 19 Grat. (Va.) 758.
(71) Gifford v. Dyer, 2 R. I. 99.
(72) James v. Shrimpton, 1 P. D. 431.
(73) Campbell v. French, 3 Ves. Jr. 321.

"As I understand that my late sister, Margaret Bell, has two grandchildren living in Northumberland County, Virginia, within three miles of North Cherry Point Church, whose names are Price Campbell, a grandson, and Pinkston Campbell, a granddaughter, I give to each of them £500." A codicil to this will, made about four and one-half months later, contained the following clause: "And as to the legacies or bequests given or bequeathed by my will to my sister Margaret Bell's grandchildren, I hereby revoke such legacies and bequests; they being all dead." The grandchildren were not dead and survived the testator. The court held that the legacies were not revoked. Although there was in the codicil a statement which literally spelled revocation, still it was clear, from the reason given therefor, that nullification was not desired if the grandchildren were still alive. Therefore the net intent expressed by this clause of the duly executed codicil was not revocation of the words in the will giving the legacy to the grandchildren, but a wish that no one else through any possibility should take by virtue of this provision. It is a case where the court ignored the literal significance of the expression, in favor of what that expression showed clearly was the real wish of the testator. All courts do not always display like common sense.

§ 103. **Revocation cannot be conditional.** Revocation of a will in its technical sense means recall of testamentary expression. A revocation cannot be conditional. If a testator cancels a will and says orally: "I revoke this only if my wife survives me," there is no revocation although the wife does outlive him, because he does not

intend to recall the will absolutely at the time of cancellation. What the testator really intends is not to revoke his testamentary expression, but to attach a condition to its provisions, and he cannot do this except through the formalities required for execution of a valid will (74). If a testator writes: "I revoke my will only in case my wife survives me," and duly executes this expression as a codicil, the intention that it conveys can be accomplished, because the condition of nullification (not revocation) is then validly attached to the previous expression. The word revocation is often loosely used to denote various sorts of nullification which do not involve a recall of testamentary expression (75).

§ 104. **Dependent relative revocation.** There is a class of decisions which apparently are contrary to some of the statements made in the two preceding subsections. As a type of this class consider the following: A testator has willed all his property to his brothers and sisters in equal portions. He decides to make a new will, containing provisions somewhat different from those indicated in the existing testamentary expression, for instance, altering the shares of some of the brothers. He executes an instrument expressing his changed testamentary wishes, and then destroys the "superseded" will. Later the testator dies. It turns out that the new will was not properly executed and is therefore void. The contents of the destroyed will may be proven and admitted to probate, unless it is shown that the testator at

(74) Skipworth v. Cabell, 19 Grat. 758 (Va.).

(75) See opinion of Denio, C. J., in Langdon v. Astor, 16 N. Y. 9, 39-42.

the time of destruction intended to revoke it absolutely, irrespective of the validity of the second will. The first will stands unrevoked, not on account of the testator's mistake, nor because it is presumed that his revocation was intended to be conditional, but because there is a presumption that he did not destroy the will to revoke it, but in order to get rid of what he regarded as a superseded and useless document (76). Similar cases occur where the testator cancels a part of his will and interlines new provisions, without a due formal re-execution, under circumstances which raise the presumption that he intended to modify his will only by substitution of the new provisions for the old, and not to revoke without the substitution. There is here again no intent to revoke expressed by the cancellation alone. The intent is to revoke by a substitution which fails, and therefore the cancelled expression stands unrevoked (77).

These cases are an illustration of the fact that to be effective the formalities of revocation required by statute must be performed as expressions of revocatory intent. If the expression of revocation chosen by the testator fails, a nullification does not exist merely because, incidentally, acts have been done that outwardly tally with those required by statute, but which were not in themselves intended to express revocation.

§ 105. **Revival of revoked testamentary expression.** A revoked will may be revived by a formal reexecution, or

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(76) In re Knapen's will, 75 Vt. 146; Powell v. Powell, L. R. 1 P. & D. 209.

(77) Pringle v. M'Pherson, 2 Brev. (S. C.) 279; Wolf v. Bollinger, 62 Ill. 368.

by being incorporated by reference into an instrument which is duly executed as a testamentary document (78). In some states, if a will is revoked by the substitution of a later will and afterwards the later will is revoked, the former will is ipso facto revived, if it is still in existence. In some states this effect will follow, only if the latter will contained no express revocation of the former. In some jurisdictions the former will will be revived, only if the court decides that there was an intent to revive at the time of revocation of the second will (79). In some jurisdictions there will be no revival, unless there is an expression of the intent to revive, in writing, executed with the formalities necessary for the making of a valid will (80).

§ 106. **Nullification by lapse.** If a person, to whom a legacy or a devise is given by a will, dies before the testator, of course he or she cannot take under the will. The legacy or devise is said to *lapse*. The testator may indicate in his will a substitution of some other person or persons, in case of the decease of any of his legatees or devisees—substituting, for instance, the children or heirs or other representatives of the legatee or devisee; but, unless this is done, the testamentary expression giving the legacy or devise becomes ineffective pro tanto (81). It is provided by statute in some jurisdictions that, if there is a devise or bequest to a child of the testator, who

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(78) Allen v. Maddock, 11 Moo. P. C. 427; Matter of Campbell, 170 N. Y. 84.

(79) Pickens v. Davis, 134 Mass. 252.

(80) In re Noon's Will, 115 Wisc. 299.

(81) Wright v. Hall, Fort. 182; Molineaux v. Raynolds, 55 N. J. Eq. 187.

dies before the testator leaving lineal descendants, the descendants shall take the gift in place of the deceased legatee or devisee. In some jurisdictions a similar provision applies to legacies or devises to other relatives of the testator. There are other qualifications and limitations to such a provision in some states, which we need not consider here (82).

§ 107. **Nullification by lack of ownership of property concerned.** If a person makes a testamentary disposition of certain property, which he sells or gives away and does not regain before he dies, the legacy or devise of this property fails (83). So, if the property of the testator is insufficient to satisfy his debts and testamentary gifts, there is necessarily a failure of the testator's wishes pro tanto.

In this connection it may be well to say a word about a rule of the old English law of wills which formed part of the common law of many of our older states, but has been generally abolished. Under the former English law, a will affected no real property except that owned by the testator at the time he made it. Furthermore, if he parted with any of the real property devised by his will, or materially changed his interest in it after making the will, even if he recovered the property before his death, the will could not affect it. For instance, if the testator conveyed in fee land which he had devised, and acquired it again before his death, the land would not pass under the will unless there was a re-execution after the last ac-

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(82) See Cal. Civ. Code, § 1310.

(83) Ametrano v. Downs, 170 N. Y. 388.

quirement (84). Generally, statutes provide that a will shall cover after-acquired lands of the testator and that no change of interest in land devised shall cause a nullification, except in so far as necessitated by the change in interest or the terms of the devise (85). In some states, however, there is a provision attached, that nullification shall result if the testator indicates an intent to that effect in the instrument by which the change of interest in made (86). Where such a provision exists, it gives another means of revocation of limited scope. If a testator wishes to revoke a devise of land, which he is conveying to another for life, he may do so in these states simply by stating his wish in the instrument of conveyance.

§ 108. **Nullification by marriage and by birth of children.** In many jurisdictions subsequent marriage nullifies a woman's will. In some jurisdictions subsequent marriage also nullifies a man's will. In some of these jurisdictions nullification results only if the will is not made in contemplation of marriage (87). In some nullification results only if the spouse of the testator or testatrix survives him or her (88). In some jurisdictions marriage alone does not annul a man's will, but marriage and following birth of a child do (89). In some states, however, nullification does not result even in such a case, if some provision has been made for the wife and children,

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(84) Earl of Lincoln's Case, Freem. C. C. 202.
(85) Molineaux v. Raynolds, 55 N. J. Eq. 187.
(86) Cal. Civ. Code, §§ 1303-1304.
(87) Ingersoll v. Hopkins, 170 Mass. 401.
(88) Sanders v. Simcich, 65 Cal. 50.
(89) See Marston v. Fox, 8 A. & E. 14.

either by will or in some other manner by the husband and father; or, in some states, if an intention is shown in the will not to provide for them. In some of these jurisdictions also, nullification results only if wife or "issue" survive; and, in some, the issue only need be provided for to prevent nullification. In some jurisdictions the birth of a child to the testator after a will is made has the effect of revoking it—in some states only, however, if no provision has been made for the child by the will, or, in some states, unless an intention not to make such a provision is shown in the will. In most of these jurisdictions it is provided that there shall be only part nullification, i. e., in so far as is necessary to give the child as much as he or she would have taken by intestate succession. There are other variations in the provisions, but these are sufficient to give a general idea of the importance of subsequent marriage and of subsequent birth of children, as agencies nullifying testamentary expression.

§ 109. **Nullification by lack of provision for descendants.** In some jurisdictions, if the testator fails to provide by his will for any of his children, or for the issue of any deceased child, unless it appears from the will that the omission was intentional, an omitted child or omitted issue take the same share of the testator's estate that it or they would have taken if the testator had died intestate. This provision generally does not apply, if the omitted child or issue had an equal portion of the testator's estate by way of advancement during the testator's life (90).

(90) See Cal. Civ. Code, §§ 1307-1309.

CHAPTER III.

ADMINISTRATION OF ESTATES.

Section 1. General Requisites.

§ 110. Offices of executor and administrator. It obviously is necessary that some agency take charge of the estate and affairs of a decedent, in order that his obligations may be satisfied and his property distributed in an orderly manner to those who legally are entitled to it. The person who is authorized by law to act as representative and manager of an estate for these purposes is called an executor or an administrator.

An executor is a person or one of a number of persons nominated to such an office by a will, and legally invested with authority to perform its functions. An administrator is a person or one of a number of persons appointed by a competent court, and invested by law with authority to act in a capacity similar to that of an executor, without a nomination to the office by the will of the decedent. At common law, the rights and powers of an executor differed in some particulars from those of an administrator, but generally today the office of the one differs very little in its incidents from that of the other. In some jurisdictions, an executor still has the right to take charge of the property of the deceased and to exercise a limited management over the affairs of the estate, before his appoint-

ment is legally perfected (1). On the other hand, an administrator has no rights of control until he has been legally invested with his office by proper court proceedings (2).

§ 111. **Courts of probate and administration.** As a governmental agency for promoting the speedy and orderly settlement of the estate of a decedent, certain courts have been given by the laws of every state and territory a special jurisdiction to appoint executors and administrators, to grant probate of wills, and to supervise generally the allowance and payment of claims against the estate, the accounting of executors and administrators, and the distribution of the balance of the personal property after payment of claims and expenses of administration. These courts are known generically as probate courts. In some states the jurisdiction exists in courts of more general powers, with such appellations as county courts or superior courts. In some a special court has been erected, with some such title as probate court, surrogate's court, orphan's court, court of ordinary, register's court, or prerogative court.

§ 112. **Necessity of official administration.** In some jurisdictions it is not necessary to put an intestate estate, which is entirely free from debts and other obligations, through the course of official administration. The persons entitled to distribution may agree among themselves upon a division of the property, without the interposition of administrator or court, or may obtain a decree in equity

(1) Thiefes v. Mason, 55 N. J. Eq. 456; Johnes v. Jackson, 67 Conn. 81. See, however, Stagg v. Green, 47 Mo. 500.

(2) Morgan v. Thomas, 8 Exch. 302.

settling their respective shares (3). Also, if a testate estate is free from obligations and no executor is named in the will to carry out its provisions, the persons entitled to succeed to the property may avoid the expense and delay of administration in some jurisdictions by agreeing upon a settlement of their interests. Such a voluntary distribution, or such an agreement to distribute can, however, bind no one who does not become a consenting party to it (4).

In some states there are statutes which provide, that, if the same person who is nominated and qualified as executor is also residuary legatee under the will, he may avoid the formalities of the usual course of administration by giving a bond to pay all debts and legacies. The bond is subject to approval by the probate court, and, when the provisions of the statute are complied with, constitutes an admission that there are sufficient assets to pay debts and legacies and makes the executor personally liable for satisfaction of them (5). It is therefore inadvisable for the executor to avail himself of this means of unsupervised administration, unless it is very clear that the estate is abundantly sufficient to satisfy all demands.

In many states administration is unnecessary, if the estate is of less than a certain value. Probably in no jurisdiction would it be required, if the property is not more than sufficient for the immediate support to which

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(3) Robinson v. Simmons, 146 Mass. 167; Ledyard v. Bull, 119 N. Y. 62.

(4) Kilcrease v. Shelby, 23 Miss. 161.

(5) Colwell v. Alger, 5 Gray (Mass.) 67.

the widow and minor children are entitled (6). In a few jurisdictions a testator can effectually provide by his will that his executor may settle the estate with but a few preliminary formalities in the probate court. In some, administration must be inaugurated within a certain number of years or not at all (7).

§ 113. **Same: (continued).** With the exceptions indicated in the preceding subsection and a few others prevalent each in one or two jurisdictions only, it is practically necessary that every estate, testate or intestate, go through the course of official administration under the supervision of a probate court. This is essential to vesting a good title to their shares of the estate in legatees and distributees, to the orderly adjustment and payment of the claims of creditors, and to freeing, within a short period, both the real and personal property of the estate from the cloud of possible outstanding and unpresented claims against it (8).

Section 2. Burial of Decedent.

§ 114. **Burial of deceased.** The first post-mortem matter requiring attention is the proper burial of the decedent. Usually this is attended to by the members of his immediate family. If they neglect the duty, however, the executor or any person who may decorously and unofficiously do so will be justified in providing for the funeral. In some states the duty of burial is placed by statute upon certain specified members of the immediate

(6) Est. of Leslie, 118 Cal. 72; Danby v. Dawes, 81 Me. 30.
(7) Phinney v. Warren, 52 Ia. 332.
(8) In re Pina, 112 Cal. 14; Pritchard v. Norwood, 155 Mass. 539.

family of the deceased and certain officers in succession (9). Probably in all jurisdictions it would be held that a surviving wife, husband, or children have the right of burial (10).

§ 115. **Liability for funeral expenses.** Whoever engages the undertaker and contracts for the other necessities of the burial renders himself personally liable for the cost, unless those employed bind themselves to resort for reimbursement to some other specified person or to the estate only. If the executor or a subsequently appointed administrator pays the cost, he may obtain credit therefor in his accounting before the probate court (11). If anyone else pays unofficiously and not by way of gift, he or she may be reimbursed by proving a claim for the expense against the estate (12), unless the person paying is the husband of the decedent, who is primarily liable in most jurisdictions (13). In any case, no unreasonable expenses not authorized specially by the will, but only such as are required for the ordinary and suitable incidents of the funeral and burial of one of the wealth and position of the decedent can be charged against the estate. The executor or administrator may, in most states at least, be credited with the expense of erecting a suitable monument over the grave (14); but apparently any one else can do so only at his own cost. If the monument is erected by

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(9) Gardner v. Gantt, 19 Ala. 666; Leamon v. McCubbin, 82 Ill. 263.

(10) Enos v. Snyder, 131 Cal. 68.

(11) In re Galland, 92 Cal. 293.

(12) Patterson v. Patterson, 59 N. Y. 574.

(13) Staples Appeal, 52 Conn. 425. See, however, Constantinides v. Walsh, 146 Mass. 281.

(14) Webb's Estate, 165 Pa. St. 330.

the wife or children without an order of court, it must be done at their own expense, unless a will provides otherwise. Even the executor or administrator would not be justified in erecting a *family* monument without special authority (15). In case the estate is insolvent, the justifiable expenses for funeral and burial will be confined in narrower limits than they would have been if the property left by the decedent was ample to satisfy all claims; but the cost of a decent burial and of a headstone probably would always be allowed (16).

Section 3. The Estate Before Administration.

§ 116. Real property. In many states, the decedent's real property goes directly to the heirs and devisees without administration, subject only to the power of the administrator or executor to sell it, or to take the rents and profits under order of court or in accordance with a special authority given by will, for the payment of debts or of legacies legally chargeable on it (17). In some jurisdictions, the executor or administrator is entitled to take charge of the realty as well as of the personalty, without a previous order of court, whenever the payment of creditors or other exigencies of administration require it (18). In some states, the heirs or devisees are not entitled to possession against the personal representative

(15) Samuel v. Estate of Thomas, 51 Wisc. 549; Morgan v. Morgan, 83 Ill. 196. If the personal representative unjustifiably neglects to provide a proper monument, however, the widow may obtain an order of court authorizing an expenditure for the purpose. Crapo v. Armstrong, 61 Ia. 697.

(16) Sullivan v. Homer, 41 N. J. Eq. 299.

(17) Noe v. Montray, 170 Ill. 169; Thorp v. Miller, 137 Mo. 231.

(18) Howard v. Patrick, 38 Mich. 795.

(executor or administrator), until an order or decree for distribution of the realty is made by the probate court in the regular course of administration (19).

§ 117. **Chattels.** Neither a legatee nor a person entitled under the laws of intestate distribution has a right to take or hold beneficially any portion of the chattels of the estate, before the executor or administrator delivers them in the due course of administration. In fact, if any person intermeddles with the chattels of the estate before the inauguration of administration, for any other purpose than to preserve them until the qualification of an executor or administrator, he may be liable as a wrongdoer to the personal representative, and in some states also may make it possible for creditors, legatees, and other claimants of the estate to treat him as an executor by wrong and recover against him for the amount of their claims to the value of the property which he has converted (20). In some jurisdictions he may be liable to a greater extent by way of penalty. Under certain circumstances in some jurisdictions, the intermeddler will find himself subject to a criminal prosecution also.

Some exceptions to these statements must be noted. Generally the widow and surviving minor children of the decedent would not be held as wrongdoers, for using provisions or funds of the estate to the amount of their legal allowance for the necessities of life, pending the inauguration of administration (21). Also it is to be noted that no liability will result, if the persons beneficially en-

(19) Knowles v. Murphy, 107 Cal. 107.
(20) Harris v. Cable, 104 Mich. 365; Perkins v. Ladd, 114 Mass. 420.
(21) Craslin v. Baker, 8 Mo. 437.

titled to the property take it, when the law does not require administration. If the person who intermeddles is afterwards appointed administrator, his acts are validated ex post facto in so far as they would have been justifiable if they had been done after his qualification (22).

§ 118. **Claims in favor of the estate.** Claims in favor of the estate, which are not appurtenant or incidental to some real property of the decedent, cannot be prosecuted by anyone except a duly appointed and qualified executor or administrator, except, in some jurisdictions, in a case where administration is not required by law and is not taken out (23). Also payment or performance cannot legally be made to anyone except the administrator or executor. A debtor who pays one who has not qualified as personal representative runs the risk of being compelled to pay again (24). The person who takes such a payment can be held as a wrongdoer in accordance with the principles stated in the preceding subsection (25). If the payee afterwards qualifies as personal representative, the payor may set up the premature payment in defense (26).

§ 119. **Claims against the estate.** Before the inauguration of administration, unsecured creditors have no legal remedy against any person as representing the estate, except in cases where a person has subjected himself to liability under the principles stated in the two preceding subsections; nor can he legally seize or subject to his claim any property of the estate on which he has

(22) Alvord v. Marsh, 12 Allen (Mass.) 603.
(23) Baird v. Brooks, 65 Ia. 40; Patterson v. Allen, 50 Texas, 23.
(24) Stahl v. Brown, 72 Ia. 720.
(25) Sharland v. Mildon, 5 Hare, 469.
(26) Alvord v. Marsh, 12 Allen (Mass.) 603.

no lien. His only recourse is to demand an inauguration of administration in the probate court (27). No one has authority to pay creditors of the estate, except the duly qualified executor or administrator. If a payment is made by any one else, he runs the risk of being that amount out of pocket. However, if the payment is made unofficiously, as, for instance, by a person beneficially interested in the estate to preserve it from the enforcement of a lien, he may recover his expense as a claim against the personal representative or against the estate in the course of administration. Such unauthorized payments are dangerous, however. If a person interested in the estate feels that a bill should be paid immediately, the best way of satisfying his desire is to purchase the claim by paying its amount to the creditor and taking a legal assignment of it from him. Even if this is done, there will still be the burden of proving to the satisfaction of the personal representative afterwards appointed, or of the court, that the claim is a legally enforceable one for the amount paid. If the person who pays the claim is afterwards appointed administrator or executor, and if he has paid it in the capacity of prospective administrator or executor, he may credit the payment in his accounts as though it had been made in the due course of administration, except in those jurisdictions where a personal representative is not authorized to pay a claim without a previous order of court (28). In these jurisdictions, the personal representative would have to prove his payment as a basis for a quasi-contractual claim against the estate.

(27) Flash, Lewis & Co. v. Gresham, 36 Ark. 529.
(28) Rainwater v. Harris, 51 Ark. 401.

Section 4. Probate of Will.

§ 120. Presentation of will for probate. If the testator left a valid unannulled will, the first step in the administration of the estate is to present it for probate. This may be done by the executor, or by anyone who is interested and can gain possession of the will. If the person who has possession of the will refuses to offer it for probate or to surrender it, he can be compelled by process of law to do one or the other. There are statutes in most jurisdictions fixing a certain period within which the executor of the will is required to present it for probate (29). This period varies from the time when the custodian learns of the testator's death to within three months after his decease. In many states, the secreting or withholding of a will by the custodian subjects him to statutory penalties, varying in the different jurisdictions from liability for damages to any person interested in the will to prosecution for grand larceny under certain circumstances.

§ 121. Time within which probate is allowed. In many states there is a statutory limitation of the time within which probate of a will may be allowed. The period varies from three to twenty years after the death of the testator. In some jurisdictions there is no limit to the time within which a will may be probated. In some states, however, if a devise of land is not probated within a certain number of years, a bona fide purchaser without notice from the heirs of the testator will acquire an indefeasible title (30).

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(29) See Cal. Code Civ. Proc. §§ 1298, 1299, 1301.

(30) Cal. Civ. Code § 1364.

§ 122. **Court in which will is probated.** Generally it is required that a will of personal property be probated in the court of probate jurisdiction of the county or other municipal division in which the testator resided at the time of his death, and, in most states, probate of the will, in so far as it concerns realty within the state, is established before the same tribunal. In some jurisdictions, however, a devise of real property cannot effectively be probated, except in and for the purposes of a suit concerning the land and calling the validity of the devise into question. For instance, in these jurisdictions, the devisee might sue the heir in possession in ejectment for the land, and in the suit prove the will as a basis of his title. Such a probate would be effective only as between the parties to the suit and persons in privity of title with them.

§ 123. **Method of probating will.** In some jurisdictions a non-contentious probate of the will, which will be good until attacked, may be obtained in the probate court, without serving notice on parties interested and without the testimony of any but a single witness. In many jurisdictions the statutes prescribe a certain short period within which the attack must be made. In some, the testimony of all the subscribing witnesses within reach of the process of the court is required at a non-contentious probate. When a contest over probate arises, all parties legally interested must be served with notice in the manner specified by statute. The method of proving the will is regulated in many states by statute. The requirements are too varied and technical to justify statement in detail here. It is a common requirement, however, that all competent attesting witnesses within reach of process of the

court be summoned. In some states it is required that the deposition of an attesting witness beyond reach of process be taken. If the testimony of the attesting witnesses cannot be obtained, in most jurisdictions the validity of a will may be established by other evidence. There are generally special requirements concerning the probate of holographic and of nuncupative wills.

§ 124. **Probate of lost or destroyed wills.** A will that has been lost or destroyed is not necessarily ineffective. In most jurisdictions, if it is established to the satisfaction of the court that the will was validly executed and that it was not annulled in any way, and if sufficient proof of its contents is produced, the will so proven may be admitted to probate. In some jurisdictions the contents of the will must be proven by two witnesses, and in some a lost or destroyed will cannot be proven unless it is established that the loss or destruction occurred after the testator's death, or was caused fraudulently in his lifetime (31).

§ 125. **Extraterritorial effect of probate of will.** The probate of a will in the state of the testator's domicile has no universal extraterritorial effect. If, as frequently happens, a testator has property located in other states or in foreign countries, or if he has non-resident debtors whose property or persons cannot be reached by judicial process of the state of the testator's domicile, generally it will be necessary to satisfy the law of these other jurisdictions concerning the probate of the will and the requirements of administration legally to get control of these extra-

(31) Cal. Code Civ. Proc. §§ 1338-1341; Sugden v. Lord St. Leonards, 1 Prob. Div. 154.

territorial portions of the estate (32). The will need not be proven first in the state of the domicile of the testator to be effective in other jurisdictions. Its effectiveness to pass personal property in another jurisdiction may be established by a probate there (33). However, if the will has been probated in the state of the testator's domicile, it may be admitted to probate in many jurisdictions by the production of a duly authenticated copy of the record of the probate, upon compliance, in some of these jurisdictions, with certain requirements of notice to the persons interested. In some of these jurisdictions, a probate by these means will not be conclusive as far as the will concerns real property within their limits. In some jurisdictions, an authenticated copy of the probate of the will in the state of the testator's domicile may be given in evidence or recorded as an instrument affecting real property.

Section 5. Appointment of Personal Representatives.

§ 126. Appointment and qualification of executor or of administrator with will annexed. When the will has been duly probated, the court will, upon application, issue letters testamentary to the person or persons indicated in the will as executor or executors, unless some disqualification is shown (34). If no executor is indicated by the will, or if the person indicated is disqualified or is dead or refuses to serve, *letters of administration with the will annexed* will be issued to a person selected from among

(32) M'Cormick v. Sullivant, 10 Wheat. 192.
(33) Armstrong v. Lear, 12 Wheat. 169.
(34) Clark v. Patterson, 214 Ill. 533.

those applying to the court, who are qualified to act under the statutes of the jurisdiction. Preference will be given to those who take under the will, or to someone interested in the distribution of the estate. When letters have been issued to an executor or an administrator with the will annexed, he may complete his qualification by taking the oath of office and filing a bond, if a bond is required of him. Generally, the taking of the oath is an essential prerequisite to full investiture with authority to administer. In some jurisdictions, the giving of a bond when required is also a prerequisite; but generally failure to give the bond merely makes the letters voidable (35). In some jurisdictions an executor has a limited authority, arising from the will, to proceed with administration before the issue of letters by the probate court. He may, for instance, take charge of the property of the estate, collect and pay debts, and even commence suits in his representative capacity, though he cannot prosecute them to judgment before he obtains his letters.

§ 127. **Disqualifications for executorship.** In some jurisdictions non-residents will not be appointed executors, and in some others a non-resident nominee must fulfill special requirements. Persons below a certain age are also disqualified. The age varies in the different jurisdictions from seventeen to twenty-one. If a person nominated in the will as sole executor is below the proper age, in some jurisdictions an administrator for the period of his minority will be appointed, and he will be entitled to qualify upon attaining the proper age. If the minor

(35) Monroe v. James, 4 Munf. (Va.) 194.

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is one of several persons named as co-executors, the others may serve alone until he qualifies. In some jurisdictions a married woman is not legally competent for the office, and in others she cannot act without the consent of her husband. Other common disqualifications are mental incapacity, immorality, lack of integrity, and drunkenness. Insolvency or illiteracy is not necessarily a disqualification, unless it is specially made so by statute. In some jurisdictions a corporation may act as executor or administrator, if properly authorized by its charter (36).

§ 128. **Appointment of administrator when there is no will.** If no will is probated, an administrator will be appointed upon application to the probate court. Generally the surviving husband or wife is given the first right to an appointment. In some jurisdictions the surviving husband may validly transfer his right to administer to another. In some jurisdictions the court may choose between widow and the next of kin, or grant administration to both together. The next of kin is or are the person or persons, other than the surviving husband or wife, who are entitled to take the personal property of a decedent after administration by intestate succession. The determination of the next of kin depends so largely upon varying statutes, that it would be unprofitable to discuss the rules for their determination here. After the next of kin in order of preference come creditors in some jurisdictions. In some jurisdictions a creditor will be preferred to the next of kin, if the estate is insolvent or if it is only large enough to satisfy the claims of cred-

(36) Hathornwaite v. Russel, 2 Atk. 126; In re Estate of Brown, 80 Cal. 381; In re Estate of Cady, 36 Hun, 122, 103 N. Y. 678.

itors (37). In some of the states there is an officer known as the public administrator, who may be appointed by the probate court to take charge of administration of estates under circumstances prescribed by statute, which vary in the different states. Generally he cannot be appointed in preference to competent interested relatives who apply; but sometimes he is preferred to a creditor (38).

When the administrator has been selected by the court, letters of administration are issued to him. An administrator as well as an executor must take his oath of office before he is fully qualified to act, and must also file the statutory bond required before proceeding with the administration. In most jurisdictions, failure to file the bond does not render the appointment void, but makes it voidable (39).

§ 129. **Disqualifications for office of administrator.** Generally a disqualification for executorship would constitute a disqualification for the office of administrator. It has also been held in some jurisdictions that illiteracy, insolvency, and interests conflicting with those of the estate are disqualifications. The judge of the court of probate has generally more discretion in the appointment of an administrator than in the appointment of an executor. A person nominated as executor by the testator must generally be appointed by the court if he applies for letters, unless he is in some way legally disqualified.

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(37) Raburn v. Bradshaw, 124 Ga. 552; Edson v. Edson, 143 Cal. 607; Buckner's Adm'rs v. Buckner, 120 Ky. 596; Wilkinson v. Conaty, 65 Mich. 614.

(38) In re Egger's Estate, 114 Cal. 464.

(39) Plemons v. Southern Ry. Co., 140 N. C. 286.

§ 130. Administration bonds. Administrators are required to file a statutory bond to perform fully their duties, usually with two sureties and with a penalty of twice the estimated value of the property coming into their hands. Executors are not required to file a bond upon taking office in some states. In other states a bond is necessary from an executor as well as from an administrator. In some a bond is not required if the testator indicates in the will that it shall not be (40). Additional bonds may be required, whenever it is shown that adequate security is not furnished by the existing bond. In some states an additional special bond is required, when the court gives the personal representative permission to sell real estate (41).

§ 131. Resignation and removal of personal representative. One who has a prior right to administer may renounce it before he legally takes the office upon himself, or may waive it by failure to apply for letters within the period prescribed by statute; but in the absence of statutory provision no one who has qualified as executor or administrator has a right to resign (42). In some states there are statutes permitting resignation. Furthermore, the probate court may remove a personal representative from office for cause, and it has been held in some jurisdictions that a resignation will be treated as a refusal to serve, thus amounting to sufficient cause for removal. A personal representative may be removed for a mal-

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(40) McCann v. McCann's Ex'x (Ky.), 93 S. W. 1045.
(41) Ward v. Mississippi, 40 Miss. 108.
(42) Cable v. Cable, 76 Ia. 163; Sitzman v. Pacquette, 13 Wisc. 325.

feasance in office, for wilful or serious neglect of his duties, or for incompetency, mental or statutory (43).

§ 132. **Administrators de bonis non.** Whenever a vacancy occurs in the office of administrator or executor after the official inauguration of administration, a special administrator called an *administrator de bonis non* may be appointed to complete the administration (44).

Section 6. General Duties of Personal Representative.

§ 133. **Inventory.** The first duty of the personal representative after qualification is to take charge of all the personal property of the decedent, and in some states of the real property also, lying within the jurisdiction in which his letters are granted. His second duty is to make a complete and detailed inventory of all the property which is in his hands as executor or administrator or of which he has knowledge, including claims of the estate against others. This inventory must be filed in the probate court within a period which varies in the different jurisdictions from fifteen days to six months. If the personal representative learns of property not included in the inventory, after it has been filed, in most states he is required to file an additional inventory. A failure to file the inventory within the time limited, or to include in it any of the property of which he has knowledge and which he should list, constitutes a technical breach of the delinquent's bond. He may be peremptorily

(43) Roy v. Whitaker, 92 Tex. 346; Tulburt v. Hollar, 102 N. C. 40; Comstock v. Crawford, 3 Wall. 396.

(44) Lunsford v. Lunsford, 122 Ala. 242.

directed by the court to file the inventory, and may be fined or imprisoned for contempt, or removed from office if he fails to obey the order. If there is no property to inventory, this is an excuse; but in such a case an affidavit stating the fact should be filed (45). The inventory should identify particularly each separate item of property. In some states it must and in others it need not include the property set apart by law for the immediate support of the widow and minor children (46).

§ 134. **Appraisement.** In some states the personal representative must state in the inventory an estimated exchange value of each item. In most jurisdictions, however, two or three disinterested persons are appointed by the probate court to make an itemized appraisement, and, in some, to assist the personal representative with the inventory. This appraisement is not a conclusive indication of the value of the property, but will be taken as prima facie evidence in any controversy in the course of administration (47).

§ 135. **Duties of personal representative in general.** In general, it is the duty of the personal representative to take charge of all the property of the decedent's estate within the jurisdiction in which he is appointed, excepting in most jurisdictions the real property, to collect all claims owing to the estate, to pay the debts and other obligations of the estate (in some jurisdictions only under order of the probate court), to manage all the property

(45) Atwood v. Lockwood, 76 Conn. 555; Oglesby v. Howard, 43 Ala. 144.

(46) In re Holderbaum's Estate, 82 Ia. 69; Pursel v. Pursel, 11 N. J. Eq. 514.

(47) In re Mullon, 145 N. Y. 98.

in his charge, to prosecute and defend all suits by or against the estate, to wind up the affairs of the estate as speedily as possible, and, in many jurisdictions within a short period, generally one or two years, to pay legacies and distribute the balance of the estate to those entitled, under the order of the court.

Section 7. Extraterritorial Authority of Personal Representative.

§ 136. Foreign administration required for foreign property. The official appointment of an executor or administrator by a probate court gives him no representative authority outside of the state or territory within which he is appointed. If there is property belonging to the estate in another jurisdiction, the appointee has no rights or duties with respect to it, unless the law of the other jurisdiction gives him them. In order that this property may be legally administered against opposition, it is generally necessary to inaugurate separate administration proceedings in the courts of the state or territory within which it is situated. The person appointed as personal representative in this separate proceeding may or may not be the same person who was appointed in the first jurisdiction. It is customary, however, to appoint as personal representative in other jurisdictions the same person who has been appointed in the state or territory in which the testator or intestate was domiciled at the time of his death, unless some statutory disqualification prevents it. However, although the same person may be personal representative by separate appointments in different states, his office and administration in each state is

entirely distinct, and he must account separately to each court for what is done or should be done under its authority (48).

The administration in the state of the decedent's domicile is called the *domiciliary administration.* Those in other jurisdictions are called *ancillary administrations.*

§ 137. Domestic title of executor valid elsewhere. Although an administrator or an executor generally will not be recognized in his representative capacity outside of a jurisdiction for which he was appointed and has qualified, his title to property of the estate, acquired within the jurisdiction of his appointment, will be respected in any state to which that property may be subsequently removed. He can recover judgment in any court which acquires legal jurisdiction of the defendant and of the suit, for wrongful injury to the property or for a wrongful conversion of it, after the inception of his title. In such cases he sues, not in his representative capacity, but in his individual capacity as legal possessor of the property at the time of the alleged wrong (49).

By way of illustration let us assume the following case. After X has been appointed administrator and has qualified in the state of the intestate's domicile, a horse belonging to the estate is wrongfully seized by a creditor and removed to another state. At the time that the horse was taken it was in the legal possession of X, and he therefore may sue the wrongful taker for a return of it,

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(48) Reynolds v. McMullen, 55 Mich. 568; Parsons v. Lyman, 20 N. Y. 103.

(49) McCord v. Thompson, 92 Ind. 565; Lewis v. Adams, 70 Cal. 403.

or for damages for its conversion, in any court which can acquire jurisdiction of the suit and of the defendant. X maintains such a suit, not as representative of the intestate prosecuting a claim of the estate, but individually as the person whose possessory right to the horse has been violated. If the horse had been in another state at the time of the death of the decedent and at the time of the qualification of X, and had been subsequently seized in that state by the creditor, X would have no right to sue for the wrong in other jurisdictions than that of his appointment (50).

§ 138. **Extraterritorial responsibility of executor.** As an executor or administrator has no representative authority, so generally he has no representative responsibility outside of the jurisdiction of his appointment. Therefore, creditors of the estate generally cannot sue him in the courts of another jurisdiction, although they may obtain personal service on him during a sojourn there. To have property, in his hands as personal representative, legally applied to their claims without his consent, they must proceed against him in the courts of the jurisdiction of his appointment (51). However, if it is shown that the personal representative has absconded to another jurisdiction, or has removed property to it, in order to defraud the creditors or other persons entitled to distribution, a suit in equity based upon the fraud may be maintained against him in the courts of the jurisdiction in which he is found. Furthermore, for any obliga-

(50) Crawford v. Graves, 15 La. Ann. 243.

(51) Burton v. Williams, 63 Neb. 431. But see Laughlin v. Solomon, 180 Pa. St. 177.

tions which the personal representative has himself entered into on behalf of the estate, or for any liabilities which he has incurred as possessor or manager of its property, he may be sued in any courts which can acquire jurisdiction of him through legal service of process. In cases of this class his liability is personal and not merely representative.

§ 139. **Same: Illustrations.** To illustrate the statements just made: If X is the domiciliary administrator of an estate which owes Y, a resident of another jurisdiction, a sum of money on a contract made by the intestate, Y cannot, in the courts of his home jurisdiction, recover judgment against X even though he obtains personal service on him there. Such a suit would be against X in his representative capacity, and should therefore be brought in the courts of the state of X's appointment (52). On the other hand, if Z contracts with X to furnish services in preserving the property of the estate, Z can recover judgment for the stipulated compensation from X in a suit brought in any court which acquires jurisdiction by legal service upon X. Z's claim is against X personally, though X may have a right to reimbursement from the assets of the estate. So, if X, in due exercise of his powers as executor or administrator, agrees to sell property of the estate in his possession to N, N can recover for a breach of this contract in any court which acquires jurisdiction of the suit and of the defendant. Furthermore, if X wrongfully removes the property in his charge to another state than that of his appointment,

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(52) Judy v. Kelley, 11 Ill. 211; Burton v. Williams, 63 Neb. 421.

or purchases land in another jurisdiction with assets of the estate, those who have rights in the property may establish them in the courts of the jurisdiction in which both it and the defendant are found. In these cases, the executor or administrator is not sued properly in his representative capacity on a liability of the decedent, but on his personal responsibility to respect the rights of the plaintiffs against himself (53).

§ 140. **Title to claims in favor of estate.** An administrator or an executor is the proper person to sue as successor in title to claims which survive to the estate in accordance with the principles discussed in §§ 8-11, above, and which are not appurtenant to some real property interest. As between different administrators and executors of the same decedent appointed legally in different states, a question may arise concerning the title to such claims. If the claim is due on a simple contract or is the result of a tort liability, none of the administrators can acquire more than a right to prosecute the claim against the debtor, wherever service can be obtained and his representative authority is recognized. Therefore, the debtor generally will be protected from further liability, if he bona fide pays an executor or administrator, who has authority to sue him in the courts of the jurisdiction in which he is at the time of payment (54). On the other hand, it is dangerous for the debtor voluntarily to pay a personal representative whose authority

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(53) Johnson v. Wallis, 112 N. Y. 230; Johnson v. Jackson, 56 Ga. 326.

(54) Stevens v. Gaylord, 11 Mass. 256; Sulz v. Mut. Reserve Assn., 145 N. Y. 563.

would not be recognized in the local courts, for he may be compelled to pay again to the administrator of his domicile (55). However, a payment made in the state of the debtor's domicile, to the personal representative qualified in the state of the decedent's last domicile, has been held a discharge of the debt, on the ground that no local ancillary administrator had been appointed and no evidence had been introduced that local creditors of the estate were prejudiced by the payment (56). Also, a purchaser of a claim from the domiciliary testamentary administrator has been permitted, under similar circumstances, to recover judgment against the debtor in the courts of the jurisdiction of the debtor's residence, although it was admitted that the assignor himself would not have been recognized without taking out letters in the jurisdiction where the suit was brought (57). In these cases, according to the law of the forum, the assignee of the claim was entitled to sue in his own name.

§ 141. **Same: Documentary claims.** When the claim is represented by a promissory note, a sealed instrument (as, for instance, a bond or a covenant), an insurance policy, or a judgment record, the debtor runs a risk in paying any personal representative, domiciliary or ancillary, who is not able to produce the document physically representing the claim; or, in the case of a judgment,

(55) Pond v. Makepeace, 2 Metc. (Mass.) 114.

(56) Wilkins v. Ellet, 9 Wall. 740; Parsons v. Lyman, 20 N. Y. 103. In Wilkins v. Ellet, 108 U. S. 256, it was held that a voluntary payment to an ancillary administrator under similar circumstances would bar a suit against the debtor by a domiciliary administrator subsequently appointed. Compare with these cases, Vaughn v. Barret, 5 Vt. 333.

(57) Petersen v. Chemical National Bank, 32 N. Y. 21; Campbell v. Brown, 64 Ia. 425.

who is not qualified in the jurisdiction where the judgment was rendered (58). Indeed it has been held, that, if the instrument is negotiable and is payable to bearer when it comes legally into the hands of the domiciliary executor, he may recover judgment on it in any court which acquires jurisdiction of the suit and of the defendant, on the ground that he is legal owner of the claim by virtue of his office and his possession of the document, and therefore sues not in his representative capacity, but in his own right (59).

§ 142. **Statutory authority of foreign personal representatives.** In some of our jurisdictions there are statutes which give an extensive or a limited authority to executors and administrators legally appointed in other states and territories to sue in their representative capacity in the local courts for the recovery of property or money due the estate, without taking out new letters from the local probate courts (60). Varying formalities are required in some of these jurisdictions as prerequisites to the right—for instance, filing a bond, or a copy of the appointment to office, or the letters testamentary or of administration.

SECTION 8. TITLE OF PERSONAL REPRESENTATIVE.

§ 143. **Time when title to chattels vests.** The legal possession of all chattels, held under title of the estate within the jurisdiction of appointment, vests in the executor in some jurisdictions from the time of the death of the testa-

(58) Amsden v. Danielson, 19 R. I. 533; Eells v. Holder, 12 Fed. 668; Merrill v. New Eng. Mut. Ins. Co., 103 Mass. 245.

(59) Knapp v. Lee, 42 Mich. 41.

(60) Bell's Adm. v. Nichols, 38 Ala. 678.

tor. The legal possession of such chattels vests in the administrator from the date of his qualification under an appointment by the probate court; and apparently in some jurisdictions the executor likewise acquires his right in the chattels of the estate only at the time of the formal completion of his appointment by the court. From the time when the title vests in the personal representative, whoever has the chattels in his custody holds them subject to that title. The executor or administrator may be regarded as the temporary owner for the purposes of administration, although he has no beneficial interest in them. Anyone who wrongfully injures the chattels is legally responsible to him; and he is legally responsible to other persons for legal wrongs done them through negligent use of the chattels in the course of his management of them. For purposes of obtaining legal satisfaction for wrongful damage to or interference with the property of the estate, between the time of the death of the owner and the qualification of his personal representative, the title of the latter is treated as having legally vested from the death of the testator, so that he can maintain suits in his personal capacity for such intermediate wrongs (61).

§ 144. **Time when the title to interests in land vests.** The legal possession of personal property interests in land belonging to the estate—such, for instance, as leaseholds for years—vests in the personal representative from the same time as does the legal possession of the

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(61) People v. Barker, 150 N. Y. 52: Wells v. Miller, 45 Ill. 382; Stagg v. Green, 47 Mo. 500.

chattels (62). In those jurisdictions in which the law gives the personal representative the real property of the estate as well as its personal property, for purposes of administration, the title to the realty of the estate vests in him at the same time as does the title to chattels. In jurisdictions where he has only a right to take and sell in case of deficiency of other assets, or to satisfy other purposes of administration, his title to possession accrues only when the necessity for legally exercising the right has occurred. In some jurisdictions he has no right with respect to the land, until he has obtained an order of the probate court authorizing him to sell it for the purpose of obtaining funds with which to satisfy the ends of administration (63). In what has been said here, no attention has been paid to special rights with respect to land given the personal representative by will. The definition and time of vesting of such rights depend upon the varying terms of the respective wills creating them (64).

§ 145. Right to rents and profits of real property. In jurisdictions where the personal representative is entitled to possession of the real property of the estate, he is entitled to the rents and profits therefrom for purposes of administration. He may also be entitled to them in all jurisdictions under the special provisions of the will of the testator (65).

§ 146. Time when title to claims in favor of estate vests. At common law, at the death of a testator his executor

(62) Prattle v. King, T. Jones, 169.

(63) Langston v. Canterbury, 173 Mo. 122; Campan v. Campan, 19 Mich. 115.

(64) See Lash v. Lash, 209 Ill. 595.

(65) Lockewood v. Tracy, 46 Conn. 447.

could validly commence suits in his representative capacity on all claims surviving the decedent for money, damages, or things due from persons, against whom or against whose property within the domiciliary jurisdiction he had legal means of proceeding. However, he could not proceed to file his declaration without first obtaining his letters from the probate court. In some states today an executor, and in all states an administrator, gets title to prosecute claims in favor of the estate only from the date of his complete formal induction into office, under the authority of the probate court (66). The extra-territorial rights of an administrator with respect to claims is discussed in §§ 140-41, above.

§ 147. Nature of title of personal representative to property of estate. An approximately proper conception of the nature of the personal representative's title to all tangible property of the estate, which legally comes into his possession or under his control, will be obtained if we think of him as temporary legal owner of them for the limited purposes of administration, under the more or less general control of the probate court. In vindicating his rights in them against others, he may rely on his own legal possession, and is not bound always to set up the title of the decedent and prosecute or defend as his post mortem representative (67). On the other hand, claims due the estate which are not negotiable and in legal effect payable to the possessor of a bill, note, or other instrument, can be prosecuted by the administrator or executor only in his representative capacity. Such claims are

(66) Holland v. King, 6 C. B. 727; Stagg v. Green, 47 Mo. 500.
(67) Morrison v. Ry. Co., 84 Ia. 663.

things in action of which the legal possession cannot be transferred at common law. Therefore, the administrator or executor does not theoretically himself hold such a claim, but he is entitled to enforce it as the post mortem representative of the decedent. A practical effect of this fact, in addition to those indicated already in §§ 136-41, above, is that he must declare that he brings the suit as executor or administrator of the deceased, and cannot conduct his case on the theory that the debt is owing to him as a quasi-trustee (68). The distinction between the individual and the representative capacity of an executor or administrator, upon which we have touched, is also of importance in connection with claims against the estate, as we shall see later (69).

SECTION 9. PRESERVATION AND MANAGEMENT OF ESTATE.

§ 148. **Duty of personal representative to preserve and manage property of estate.** It is the duty of the personal representative to use ordinary prudence to preserve the property and to conserve the interests of the estate in his charge (70). Therefore, he should sell all perishable property in his possession as soon as reasonably possible. In some jurisdictions a previous order of court is required for this purpose, where it is practicable to obtain it, and in some there are detailed specific provisions concerning such sales (71). Likewise, he should sell any securities of the estate which are threatened with depreciation, generally under order of court. He should

(68) Ry. Co. v. Andrews, 34 Kan. 563.
(69) See § 165, below. Glisson v. Well, 117 Ga. 842.
(70) Booker v. Armstrong, 93 Mo. 49.
(71) Wayland v. Crank's Executor, 79 Va. 602.

insure all the insurable property in his charge, whenever the circumstances and premiums are such as to make it business-like to do so (72). He should perform or otherwise discharge all contracts of the deceased which survive (73). He should invest such moneys of the estate as are likely to remain intact in his hands for some time (in some states only after the ordinary period of administration), with due care and reasonable dispatch, in such a manner as to afford ample security and the best return reasonably attainable. If the assets of the estate include shares of stock in a corporation, the right of voting this stock during administration is in the personal representative who has legal possession of it (74). If legal assessments for which the estate is liable are levied on it, the administrator or executor should pay them, in some states after obtaining an order of court for the purpose. If the stock is of little or no value, however, he would not be justified in making considerable contributions, not legally demandable, to a risky attempt to rehabilitate the corporation and its affairs (75).

For breach of any of the duties thus indicated, the personal representative and the sureties on his bond are liable in damages. For instance, a wrongful neglect to invest funds of the estate will render the personal representative accountable for interest thereon, and his sureties will be responsible for its payment (76).

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(72) Rubottom v. Morrow, 24 Ind. 202.
(73) Dougherty v. Stephenson, 20 Pa. St. 210.
(74) Market St. Ry. Co. v. Hellman, 109 Cal. 571.
(75) Parker v. Robinson, 71 Fed. 256.
(76) Woods v. Creditors, 4 Vt. 256; Frey v. Demarest, 17 N. J. Eq. 71.

§ 149. **Permissible investments.** If there are statutes such as exist in many jurisdictions, prescribing the investments permissible, these statutes should be strictly obeyed, for a departure from the permitted course will render the executor or administrator absolutely liable for all the loss suffered and for at least a reasonable rate of interest on the funds. On the other hand, all profits resulting from such an unauthorized investment enure to the benefit of the estate. In some states the deviation, although honest and made with the best intentions, is penalized severely. It makes no difference that some avenue of investment offers greater security and returns than those permitted by statute (77). If there are no statutory provisions to the contrary, apparently the only universally safe forms of investments from the standpoint of the personal representative are the bonds of the Federal government and loans upon the security of real estate within the jurisdiction of his appointment. If the investment is made upon real estate security, a safe margin should be carefully obtained. A practical rule of thumb would be not to loan more than from one-half to two-thirds of what the mortgaged property would bring at a forced sale (78). In some states it is mandatory and in all it is prudent that investments be made only under sanction of the court (79). Of course if there are directions in the will concerning investments or care of the estate, the personal representative should regard them (80).

(77) Garesche v. Priest, 78 Mo. 126.
(78) Wilson v. Staats, 33 N. J. Eq. 524.
(79) Hetfield v. Deband, 54 N. J. Eq. 371.
(80) Holcomb v. Coryell, 11 N. J. Eq. 476.

§ 150. **Care of funds of estate.** It has been held negligence for an administrator or executor to keep funds of the estate in his own house (81). When held for disbursement within a short period or awaiting an investment, they should be deposited in a separate account, in the name of the estate, in a solvent trustworthy bank or in a safety deposit vault. If they are deposited to the general account of the personal representative, or in any way mingled with his own funds or credits, he becomes absolutely liable to the estate for the amount, and is therefore answerable although a loss occurs without any negligence on his part, as, for instance, through an unforseeable failure of the bank of deposit (82).

§ 151. **Business of decedent.** The personal representative has no inherent authority to carry on indefinitely the business of the decedent. It is his duty in many jurisdictions to wind it up immediately or to sell it, generally under order of court, as soon as possible. If he elects to carry it on without authority, he subjects himself to absolute liability for all losses and will hold any net profits for the benefit of the estate (83). In some jurisdictions, however, there are statutory provisions giving the personal representative authority to carry on the business of the deceased for a short limited period, or, in some states, until it can be sold or otherwise disposed of (84).

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(81) Cornwell v. Deck, 15 N. Y. Sup. Ct. (8 Hun) 122.

(82) In re Estate of Arguello, 97 Cal. 196. There is no liability upon the personal representative for loss through a prudent and proper deposit in the name of the estate in an apparently sound bank. Jacobus v. Jacobus, 37 N. J. Eq. 17.

(83) Campbell v. Faxon, 73 Kan. 675.

(84) Dwyer v. Kaltayer, 68 Tex. 554.

A testator may authorize his executor to continue his business by proper provisions in his will. The personal representative who carries on the business will be liable personally to its creditors, although he does so in the name of the estate or of the decedent; but, if he keeps within the limits of his authority and exercises due care in management, he may be reimbursed out of the assets of the estate lawfully embarked in the business for all his expenses and losses in carrying out the directions of the testator (85). Even though the personal representative has no statutory or testamentary authority to carry on the business of the decedent, if he does so with the consent of the persons interested in the estate, those consenting will not be permitted legally to charge him with liability for losses resulting without negligence or other fault on his part in the operating of the business. They are estopped by their consent from asserting that he has committed a breach of duty (86).

§ 152. **Growing crops.** Crops growing on the decedent's land at the time of his death pass to the personal representative as "personal property." He should care for and sell the crops, either before or after maturity or severance, as the best interests of the estate dictate (87).

§ 153. **Partnership affairs of a decedent.** If the decedent was a partner, the duty and right of winding up the affairs of the partnership and turning over to the personal representative the share of the decedent in the surplus, devolves on the surviving partner or partners. The

(85) Laible v. Ferry, 32 N. J. Eq. 701.
(86) Poole v. Munday, 103 Mass. 174.
(87) Sherman v. Willett, 42 N. Y. 146.

administrator or executor is not authorized to join in this winding up process, although he is bound to see that the interests of the estate are not injured and that its rights are protected. The detailed treatment of this matter will be found in Partnership, Volume VIII of this work (88).

§ 154. **Payment of taxes: On personalty.** The duty of the personal representative with respect to taxes on the property in his charge is regulated specifically by statute in some jurisdictions. Taxes levied on property of the decedent before his death are commonly claims of a preferred class against his estate. In many jurisdictions the personal representative may pay such taxes, without a previous allowance by the court, and credit himself with the payment in his accounting as administrator or executor (89). Generally taxes on personal property in charge of the personal representative are levied against him during administration, but he is not responsible for payment, if the amount of the tax is not officially determined before the estate has been distributed or his authority over it has otherwise terminated (90). Since these taxes are levied against the personal representative and not against the decedent, in some jurisdictions they are assessable in the county or other taxing division wherein the personal representative resides, instead of (as in other jurisdictions) in that of the decedent's last domicile (91). Generally these taxes also are payable

(88) Wickliffe v. Eve, 17 How. 468.

(89) In re Babcock, 115 N. Y. 450; In re Estate of Jefferson, 35 Minn. 215.

(90) People v. Barker, 150 N. Y. 52; Herrick v. Big Rapids, 53 Mich. 554.

(91) State v. Jones, 39 N. J. L. 650; Cotton v. Boston, 161 Mass. 8.

without previous allowance in the probate court (92). The administrator or executor will be permitted to credit himself with such payments upon accounting and to reimburse himself out of the assets of the estate.

§ 155. **Same: On realty.** Generally, in jurisdictions where the personal representative has no control over real property for the purposes of administration, except a power of sale upon a previous order of court to raise funds necessary for administration purposes, he has no inherent duty with respect to the payment of taxes levied on the real property of the estate after the death of the decedent. Therefore, if he does pay such taxes, he wrongfully diverts the personal assets from their proper channels to the benefit of heir or devisee, and he and the sureties on his bond will be liable to make good to the estate the amount paid (93). However, in jurisdictions where the personal representative has charge of the real property as well as of the personal property, and also in cases where a will gives him special control and legal possession of the realty, generally he owes duties with respect to taxes on it, similar to those with respect to taxes on the personalty in his possession (94).

Whenever it is a duty of the personal representative to pay a tax, he cannot escape liability by distributing the property of the estate, under order of court, to the statutory distributees or the beneficiaries of the will. He must see that the tax is paid. To secure himself, he should pay it and have the payment allowed in his ac-

(92) Bonaparte v. State, 63 Md. 465.
(93) Young v. Kennedy, 95 N. C. 265.
(94) In re Hertman, 73 Cal. 545.

counting, before delivering legacies or distributive shares (95).

§ 156. **Inheritance taxes.** Among other taxes which the personal representative may be required to pay, are, in some jurisdictions, succession or inheritance taxes. These taxes are imposed by the state upon the right of testate or intestate succession. It would not be profitable to consider here the details of the statutes creating these taxes. Generally they are imposed upon realty within the jurisdiction and upon all personal property of a resident decedent, and in some states also upon personal property within the jurisdiction, although it belongs to the estate of a non-resident decedent. Generally the property is assessible only if the net estate of the decedent exceeded in value a certain minimum, which varies with the relationship of the decedent to the beneficiaries who succeed to his property. Generally these taxes are payable at the death of the decedent or within a limited time thereafter, and interest at a high statutory rate is added if they become delinquent (96). Where these taxes exist, usually it is the duty of the personal representative to see that they are paid, in so far as they are assessible against the succession to property in his charge. If he fails to perform this duty, he is personally responsible for the amount he should have paid with interest.

Section 10. Sale of Property of Estate.

§ 157. **Power to sell personal property.** In the course of the administration of an estate it frequently becomes

(95) State v. Jones, 39 N. J. L. 650.

(96) In re Estate of Swift, 137 N. Y. 77.

necessary to convert personal property belonging to it into cash in order to satisfy the claims of creditors, to pay legacies, or to make a distribution among those entitled under the laws of intestate succession. At common law the personal representative had the power of selling the personal property in his charge, at his discretion, being accountable to those interested in the estate for abuse or negligent use of this power (97). In some of our jurisdictions the personal representative still has a wide discretion in the management of the estate, and may sell either at public or private sale, without previous order of court, and at such times as his judgment dictates, any of the personal property in his charge which is not specifically bequeathed or devoted to a special purpose by the will. He may also sell even specifically bequeathed property, if he finds it necessary to do so in order to pay creditors or other prior claimants (98).

In many jurisdictions, however, the personal representative cannot rightfully sell personal property of the estate without a previous order of court, and in many the routine and methods of sale are prescribed in detail by statute. Generally it is required that the sale be public, unless the court specially directs a private sale. Generally some statutory form of notice of the sale must be given. A private sale generally will be ordered when it appears that such a sale will be more advantageous to the estate. In many states the personal representative has authority to sell upon credit; but, if a court has jurisdic-

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(97) Lark v. Linstead, 2 Md. 162.

(98) Schell v. Deperven, 198 Pa. 591; Edney v. Baum, 70 Neb. 159.

tion to supervise the sale, he must comply with its order concerning this, as well as any other incident of the sale. The statutes in some jurisdictions prescribe a maximum term of credit which may be given the purchaser and in some a minimum term is also prescribed (99).

§ 158. **Same: Terms of sale.** The sale generally should be for a money consideration. The personal representative is not usually authorized to make exchanges for other property nor for claims or credits due the purchaser. An acceptance by the personal representative of anything but money, or the purchaser's promise to pay money at the expiration of an authorized term of credit, will generally constitute a breach of his legal duty and will render him liable, at the option of those interested in the estate, for the value of the property sold. Also, sales made contrary to the statutory provisions are sometimes voidable at the option of those interested in the estate, and sometimes are absolutely void (100). If the sale is on credit, the personal representative must at his risk take reasonable security for the payment of the purchase money. In some jurisdictions it is required that he take a note or bond with securities. A neglect to take proper security will make the personal representative liable for the purchase price out of his own property, if he does not get it from the purchaser. On the other hand, if he takes proper security and otherwise complies with the terms of his authority, and uses due diligence in attempting a collection

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(99) Hall v. Chapman's Adm'rs, 35 Ala. 553; Citizens' St. Ry. Co. v. Robbins, 128 Ind. 449.

(100) Stronach v. Stronach, 20 Wisc. 136; Weir v. Tate, 39 N. C. 264; Hall v. Chapman's Adm'rs, 35 Ala. 553.

of the debt, he will not be responsible if the purchaser becomes insolvent or absconds without paying (101).

§ 159. Sale of real property. The power and duties of the personal representative with respect to the decedent's real property have been touched upon in several of the preceding subsections. Generally, in the absence of testamentary authority, he has no power to sell real property, unless the personal property of the estate proves insufficient for the payment of its debts, and then only after complying strictly with statutory formalities, including an application to the probate court for permission to sell and the obtaining of an order of sale from the court. The power of sale in all states rests upon statute, except where it is specially given by the will of the decedent. These statutes vary in their details in the different jurisdictions. Generally a deficiency of personal property to pay the debts of the decedent and funeral expenses is a prerequisite to the right to sell the real property; but in some states the lack of sufficient other assets to discharge the expenses of administration is likewise a valid ground for exercising the power (102). In some states the real property may be sold under order of the probate court under other circumstances than those described above, in order to further some purpose of administration (103).

§ 160 Formalities prerequisite to sale of real property. The proceedings prior to the sale of real property are prescribed in detail by statute and should be strictly fol-

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(101) Bowen v. Shay, 105 Ill. 132.

(102) In re Haxtun, 102 N. Y. 157; Tarbell v. Parker, 106 Mass. 347.

(103) Renner v. Ross, 111 Ind. 269.

lowed. Otherwise great confusion of title and loss to persons concerned may result. Generally an application, setting forth with particularity among other matters the circumstances necessitating a sale and a description of the property to be sold, is required (104). All persons legally interested must be given statutory notice and an opportunity to be heard. Proof of the facts prerequisite to a right to sell must be made to the satisfaction of the court (105). In some jurisdictions an appraisement of the value of the property must be made and filed in court. The court orders the sale, directing specifically time, place, terms, and manner. Generally either a public or a private sale may be permitted, or one for cash, or upon limited credit specified by statute. In some jurisdictions, however, only a public sale to the highest bidder is permitted; and in some the purchaser must pay cash. A public sale usually must be advertised in accordance with the specific terms of the statute (106). In some jurisdictions the personal representative is required to file a special bond before proceeding with the sale (107).

§ 161. **Conducting and perfecting sale of real property.** The sale must be conducted in strict accordance with the order of the court, and in most jurisdictions by the administrator or executor in person or by agent (108). In some the sale is conducted by commissioners or by the sheriff. If sham bidders are employed artificially to raise the selling price, often a purchaser may have the sale set

(104) Sermon v. Black, 79 Ala. 507; Renner v. Ross, 111 Ind. 269.
(105) Wilson v. White, 109 N. Y. 59; Sample v. Barr, 25 Pa. St. 457.
(106) Cal. Code Civ. Proc. §§ 1537-1554.
(107) Foster v. Birch, 14 Ind. 445.
(108) Cheever v. Hora, 22 Ga. 600; Sebastian v. Johnson, 72 Ill. 282.

aside for fraud. The sale must be confirmed by the court upon report of the personal representative before a deed is given to the purchaser. Before delivering a deed to the purchaser, the personal representative should obtain payment of so much of the purchase price as is payable in cash. He should also see that he obtains good security for the payment of the remainder, taking care not to waive any lien which he may have as vendor or otherwise. A neglect strictly to attend to these matters may result in personal liability on the part of the delinquent. The personal representative generally is not authorized to take any but a money consideration in payment for the real property. If he takes any other property by way of exchange, the sale may be either voidable or void, and the personal representative may be held responsible for the value of the land, according to circumstances and the scope of the particular statutes applicable.

§ 162. **Incumbrances and liens upon real property sold.** Unless a statute specially permits, only the interest of the decedent in the real property can be sold by the personal representative under order of the probate court. In some jurisdictions, however, it is provided that the probate court, under certain circumstances, may order a sale free from liens and incumbrances, which will be satisfied out of the proceeds of the sale (109).

§ 163. **Personal representative cannot purchase at his own sale.** Generally a personal representative is not entitled to purchase directly or indirectly, any of the property which he sells in the course of administration. If he

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(109) McConnel et al. v. Smith et al., 39 Ill. 279.

does so, the sale may be ratified or avoided at the option of those interested in the estate (110). However, after the property has been bona fide sold to a competent purchaser, the personal representative may deal with the purchaser and thus obtain a valid title for himself (111). Furthermore, if all persons interested consent, he may purchase directly at the sale for a fair price (112).

§ 164. Rights of purchasers under sale in fraud of estate. If a sale is made by the personal representative, in compliance with the legal requirements concerning procedure and prerequisites and apparently within his authority, the purchaser will get a valid title, although the personal representative acts fraudulently with respect to the interests of the estate, provided the purchaser has no notice of the fraud before he takes the conveyance and pays the price. If he has such notice, his title will be voidable at the option of those legally interested in setting it aside (113).

Section 11. Claims Against Estate.

§ 165. Duty of personal representative with respect to claims against estate. One of the most important classes of duties pertaining to the office of administrator or executor is the satisfaction of creditors of the estate, in so far as its assets permit. He should perform or otherwise discharge all the contract obligations of the decedent which survive, in many cases, however, only under order

(110) Decker v. Decker, 74 Me. 465.

(111) Wayland v. Crank's Ex'r, 79 Va. 602.

(112) Appeal of Grim, 105 Pa. 375.

(113) Adams et al. v. Thomas et al., 44 Ark. 267; McCown's Ex'rs et al. v. Foster et al., 33 Tex. 241.

of court. He must pay valid surviving claims against the decedent, and funeral expenses out of the assets of the estate, in accordance with certain principles and regulations of which some notice will be taken in succeeding subsections. Obligations which he himself has entered into as personal representative generally are not claims directly against the estate but against him personally. However, he is entitled to reimbursement for satisfaction of such of these obligations as were legally within his authority as representative. The claimants may, in some cases, have a right based on equitable principles directly against the assets of the estate (115).

§ 166. **Survival of claims against decedent.** At common law the only claims surviving against the estate of a deceased obligor were, roughly speaking: (a) those upon his contracts of pecuniary value and not purely personal in their nature; and (b) claims of other descriptions for wrongful enrichment of the estate of the decedent at the expense of the claimant. In many jurisdictions, however, there are statutes increasing to varying extents the kinds of claims that survive. It would not conduce to the purposes of this article to discuss in detail the provisions of these statutes (116).

§ 167. **Presentation of claims to personal representative.** In most, if not all jurisdictions, the personal representative, within a short period after his appointment, which varies from ten days to four months, is required

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(115) Durkin v. Langly, 167 Mass. 577; In re Estate of Smith, 118 Cal. 462.

(116) Finlay v. Chirney, 20 Q. B. D. 494; Shultz v. Johnson's Adm'r, 44 Ky. 497; Cutter v. Hamlen, 147 Mass. 471.

to publish notice of his appointment and that claims against the estate may be presented to him. The additional terms of the notice are usually specifically prescribed by statute and vary in details in the different jurisdictions. Within a limited period after the publication of this notice in strict compliance with the terms of the statute, claimants against the estate must present a statement of their claims to the personal representative, or, in some jurisdictions, file them in the probate court for approval or rejection by him. In many jurisdictions, the statement of claim must be verified by the claimant under oath. In many jurisdictions the claimant will not be permitted to proceed against the personal representative for payment out of the general assets of the estate in any other way, until the claim has been presented to him and disallowed or not passed upon within a certain short period, unless presentment is legally waived by the personal representative without allowance of the claim (117).

§ 168. **Establishment of claims.** In some jurisdictions the personal representative has authority to allow claims which he finds to be valid, without the approval of the court (118). In other jurisdictions it is necessary that the approval of the probate court be obtained, before the claim will be validly established without suit, although the personal representative approves of it (119). If the personal representative does not allow the claim, it is always necessary to establish it in a contentious proceed-

(117) In re Cowles Estate, 61 Conn. 445.
(118) Kunian v. Wight, 39 N. J. Eq. 501.
(119) Ordway v. Phelps, 45 Ia. 279.

ing against him, either in the probate court or in some other court of competent jurisdiction. Generally a matured claim must be enforced or established, within a limited time after the advertisement by the personal representative, or, in some states, after his qualification, or it will be barred against him entirely, or, in some jurisdictions, except as to subsequently discovered or uninventoried assets. The statutes fixing the time within which claims must be thus maintained are called generically "statutes of non-claim." The period prescribed varies in different jurisdictions (120). In some jurisdictions there is a requirement that an action must be commenced on a claim rejected by the personal representative, within a certain number of months after the rejection, or it will be barred (121). In some jurisdictions, claims proved within a certain limited period are given preference to those proven after it has passed (122).

§ 169. **Same: Non-matured and contingent claims.** In some jurisdictions there are statutory provisions which enable the holder of a claim against the decedent, which has not yet matured but is of a non-contingent nature, to present it to the personal representative and to prove it against the estate, in the same way that a matured claim is established. If present payment is provided for, an adjustment is made so as to give the creditor only the present value of his claim (123). A contingent claim is not payable until the contingency occurs. If it occurs be-

(120) Jones v. Jones, 41 Oh. St. 417; Prewett's Estate v. Goodlett, 98 Tenn. 82.

(121) Cal. Code Civ. Proc. § 1498.

(122) Spaulding v. Suss, 4 Mo. App. 541.

(123) Maddox v. Maddox, 97 Ind. 537.

fore the time for proving claims in the course of administration has run, it must be proven within the period, in some jurisdictions, or it will be barred. In some jurisdictions the statute of non-claim begins to run only from the time when the obligation becomes absolute. In some there are provisions for presentment of contingent claims, which permit the court to order the retention of funds to meet them upon a sufficient showing by the claimant (124). Generally a creditor, who is not barred by the statute of non-claim or by the general statute of limitations, may proceed against the voluntary distributees of the assets of the estate after the close of the administration. In some states, however, there is a special short term statute of non-claim applying to this remedy (125).

§ 170. Waiver of statute of non-claim or of limitations. The personal representative has no authority to waive the statute of non-claim. If he pays a claim which is barred by the statute, or if he suffers it to be established against him, he cannot charge it against the estate in his accounting (126). In some jurisdictions, however, he may waive the ordinary statute of limitation, which is applicable alike to claims against the estates of decedents and those against persons generally, if the claim was not barred at the decedent's death (127). The waiver, however, will be effective only with respect to the remedy against assets in the hands of the personal representative, and not as against persons having assets over which

(124) Logan v. Dixon, 73 Wisc. 533; Cobb v. Kempton, 154 Mass. 266.

(125) See note 158, § 188, below.

(126) Woods v. Woods, 99 Tenn. 50.

(127) Hally v. Gibbons, 176 N. Y. 520.

he has no right of control (128). If he waives the statute of limitation where he has no authority to do so, the consequences will be similar to those which follow a waiver of the statute of non-claim.

§ 171. **Claims of personal representative against decedent.** If the personal representative holds a claim against the decedent, he may, in some jurisdictions, retain the proportion of the assets to which a creditor duly proving a like claim would be entitled (129). In other jurisdictions, he must present it to the court for approval and allowance, and must establish its validity (130). In some of these jurisdictions the proceeding must be contentious; and, if there is no co-executor or co-administrator to defend on behalf of the estate, the court must appoint an administrator ad litem or an attorney to represent the estate for the purpose(131). In some jurisdictions neither the statute of non-claim nor the general statute of limitation will bar payment of a claim of the personal representative, unless it was barred by the latter statute before the death of the decedent (132). In other jurisdictions these statutes may bar a claim of the personal representative as well as other claims (133).

Section 12. Reimbursement and Compensation of Personal Representative.

§ 172. **Expenses of administration.** The authorized expenditures of the personal representative, other than

(128) Steele v. Steele's Adm'r, 64 Ala. 438.
(129) Ex parte Meason, 5 Binn. (Pa.) 167.
(130) See Cal. Code Civ. Proc. § 1510.
(131) Williamson v. Anthony, 47 Mo. 299.
(132) Sanderson's Adm'rs v. Sanderson, 17 Fla. 820.
(133) Williams v. Williams, 83 Tenn. 438.

payments of surviving claims against the decedent, funeral expenses, legacies, and distributive shares, constitute part of the expenses of administration which are a first charge against the estate. Upon accounting, he will be allowed credit for all such expenditures which he establishes to the satisfaction of the court (134). Vouchers for all money paid out should be obtained and kept by the administrator or executor for presentment to the court with the account of his administration.

§ 173. **Counsel fees.** In the administration of an estate the personal representative meets at every turn technical questions of legal rights, duties, powers, and requirements, which a layman cannot wisely undertake to decide for himself. It is not only prudent for him to employ competent counsel to aid him in dealing with these questions, but also it is his duty to do so. Therefore, among other expenses of administration, he may include in his accounts reasonable fees for necessary services actually rendered him by counsel (135). He will not be entitled to credit for such expenses unnecessarily incurred; nor for those which are not strictly incidental to administration. For instance, credit for fees paid to counsel for services in litigation caused by the wrongful conduct of the personal representative, or entered into by him without reasonable cause, will not be allowed; nor will such expenses incident to the defense of the rights of a particular heir, legatee, or distributee, or to the establishment of some claim or legacy of the personal representative himself,

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(134) Fuller v. Connelly, 142 Mass. 227.
(135) Young v. Kennedy, 95 N. C. 265.

since these are not properly administration expenses (136).

The personal representative will not necessarily be allowed the sum which he has actually paid in counsel fees incidental to his administration. He will receive credit for payment only to a reasonable amount. If he has been charged an extortionate price by the counsel that he has engaged, and has paid it or rendered himself liable for it, he is permanently out of pocket to the extent of the excess (137). Furthermore, in any case he must prove to the satisfaction of the court the reasonableness and necessity of the fees. Therefore, he should take vouchers itemizing in detail the charges of the attorney, for presentment to the court with his account (138). Under the mask of counsel fees, the personal representative will not be permitted to recover charges of an attorney employed to manage the estate for him. Reimbursement for expenses for legal advice, within the limits indicated, may be obtained, but not reimbursement for the cost of getting another to do the things that the personal representative should have done himself (139).

§ 174. **Expenses of litigation.** In order to get the property of the estate under his control and to defend and prosecute its rights against others, it frequently is necessary for the personal representative to take part in litigation. Whenever, as an incident to the proper administration of the estate, he reasonably and without any

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(136) Estate of Bell, 145 Cal. 646.
(137) Briggs v. Breen, 123 Cal. 657.
(138) In re Estate of Nicholson, 1 Nev. 513.
(139) In re Estate of Brignole, 133 Cal. 162.

breach of duty becomes involved in litigation on behalf of the estate, the expenses which he incurs are proper items of reimbursement as expenses of administration. He may recover for such expenses, even though they were incurred in connection with a suit decided against the interests of the estate, if it was reasonable for him to incur them under the circumstances. He cannot recover for expenses incidental to a suit, even though it was decided in favor of the interests of the estate, if it was unreasonable and unnecessary for him to engage in it (140).

§ 175. **Expenses for help and facilities in administration.** Clerical and other assistance to the administrator or executor may be found reasonably necessary in the administration of an estate. When it is reasonably necessary he may be reimbursed for expenses in procuring it (141). In connection with the administration of very large estates, it is sometimes reasonably necessary to rent and maintain an office. When this is the case, the resulting reasonable expenses will also be recoverable as part of the expenses of administration (142). Generally it is held that an attorney, agent, or servant, has no direct remedy against the estate for compensation for services rendered the personal representative. His claim primarily is one against the executor or administrator personally (143).

§ 176. **Compensation of personal representative.** The personal representative is entitled to compensation for

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(140) Woods v. Creditors, 4 Vt. 256.
(141) Henderson v. Simmons, 33 Ala. 291.
(142) Glover v. Holley, 2 Bradf. (N. Y.) 291.
(143) Walling v. Kruger, 143 Cal. 141.

his services, in most if not in all jurisdictions. The compensation is usually a varying percentage of the value of the property administered by him. The percentage varies in different jurisdictions and with the size of the estate, and in some jurisdictions with the difficulty of the duties performed by the personal representative. In some the compensation is based upon the time and labor actually expended by him. In many jurisdictions there are statutes concerning the compensation of the personal representative. The percentage fixed by statute varies from two percent to ten percent (144). If there are several co-executors or co-administrators they should all together be allowed, by way of compensation, only such a sum as a single representative would have received for the same services. Generally there will be an equal division among them, unless they agree upon some other apportionment. In some jurisdictions, however, the court may apportion the compensation among the joint personal representatives according to their respective individual services, where these are clearly established. Where there are successive personal representatives of the same estate, each will receive a portion of the total compensation allowed, based upon the proportion of his services (145).

§ 177. **Same (continued).** If the personal representative is a lawyer and uses his professional knowledge in the administration of the estate, thus dispensing with the necessity of legal assistance, he may in some jurisdictions be allowed additional compensation for these ser-

(144) Gyger's Appeal, 74 Pa. St. 42; Handy v. Collins, 60 Md. 229.
(145) John v. John, 122 Pa. St. 107.

vices. In many jurisdictions, however, there is no right to such additional compensation (146). If the personal representative has been guilty of serious breaches of duty in the administration of the estate, he may have disentitled himself to any compensation for his services. Generally the tendency is to deny him compensation under such circumstances (147). The compensation of the personal representative is one of the expenses of administration, and therefore is a preferred charge against the assets of the estate in most jurisdictions at least (148).

Section 13. Priority and Payment of Claims and Legacies.

§ 178. Priority of claims. In all jurisdictions claims against the estate are payable by classes in a fixed order of preference. This order varies in the different jurisdictions so much that only some idea of the general tendency of the statutes can be given here. Generally the expenses of administration come first in order. Funeral expenses are sometimes classed with the expenses of administration, and in almost all jurisdictions are preferred to all other claims. Expenses of the last illness are sometimes classed with funeral expenses, but are sometimes placed considerably lower in rank. In some jurisdictions the bill of the physician is placed somewhat lower in order of priority than the other expenses of the last illness. Next in order generally come debts due to the United States government. Then follow, in most jurisdictions,

(146) Taylor v. Wright, 93 Ind. 121.
(147) Clanser's Estate, 84 Pa. St. 51.
(148) Williamson v. Wilkins, 14 Ga. 416.

claims of the state or of some municipal division thereof, but generally not the claims of other states or of foreign countries. If the decedent was a trustee or occupied some other analogous fiduciary position, funds or property which he held in that capacity may be recovered specifically, in so far as they can be identified. If, however, the trust fund or property has been converted by the decedent, so that it can no longer be traced in specie, the cestui que trust has only a provable claim against the estate. Such a claim, however, in some jurisdictions is by statute given a high rank in the order of preference of claims. In some jurisdictions judgments obtained against the decedent in his lifetime are given an order of preference, generally after the classes already discussed. In many jurisdictions there is no such preference. In some jurisdictions obligations secured by mortgage or other lien are given a certain order of preference against the general assets of the estate. Debts for rent in a few jurisdictions are given an order of preference within certain limits. Wages due to servants of certain limited sorts form a class of claims, which in some jurisdictions are given preference in a varying order (149).

§ 179. Duty to pay claims in order of priority. The personal representative must pay the claims duly established against the estate in the correct order of priority. If he fails to do so, he runs the risk of being compelled to pay a prior debt out of his own pocket, after exhausting the assets in the satisfaction of inferior claims (150).

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(149) See Woerner on Admin., §§ 357-374; Cal. Code Civ. Proc. §§ 1205, 1643-1650.

(150) Tompkins v. Weeks, 26 Cal. 50.

§ 180. **Secured claims against decedent.** Generally claimants who have mortgages or other liens on specific property of the estate may enforce these liens, independently of the remedy common to all claimants against the estate. In some jurisdictions such creditors may prove against an insolvent estate only the difference between the amount of their claims and the value of their securities. In other jurisdictions they may obtain a dividend based upon the full amount of their claims, and may then resort to their securities to satisfy the balance (151).

§ 181. **Payment of debts under order of court.** At the close of the period for the presentation and establishment of claims, the personal representative generally is required to present to the probate court a complete statement of the condition of the estate, including a detailed statement of claims established and of those of which he has notice that are not established but still pending. The court may then order payment of the established claims. The personal representative is then bound to pay the claims according to the order of the probate court, in so far as it is valid, taking due care not to ignore the priority of any particular claim. If the payment is not made within a reasonable time, it may be enforced by the creditors through legal proceedings (152).

§ 182. **Payment of legacies and distributive shares.** Debts are payable before legacies or the shares of distributees of intestate property, except the exempt allow-

(151) Bristol Bank v. Woodward, 137 Mass. 412; Furness v. Union Bank, 147 Ill. 570.

(152) Cal. Code Civ. Proc. §§ 1628, 1647, 1649.

ances to the widow and minor children. Therefore, generally, the personal representative will not be compelled to pay legacies, or to satisfy devises, or the claims of heirs of the decedent in jurisdictions where he has charge of the real property, or to pay distributive shares, until after the period within which claims may be established against the estate. In many jurisdictions, however, under certain circumstances a partial distribution to legatees, devisees, heirs, or next of kin, may be made before this period has expired, upon the filing by them of refunding bonds with sufficient sureties. These refunding bonds obligate them to make repayment to the estate, in so far as may be found necessary to meet prior claims of administration (153). Whenever payment of a legacy or distributive share is ordered by the court, and, in some jurisdictions, when the personal representative without order of court promises to pay it out of a solvent estate, the legatee or distributee may compel the payment by legal process, if it is not voluntarily made within a reasonable time.

§ 183. **Marshalling of assets.** Under this heading a very intricate and difficult part of the law of administration is discussed in professional treatises. It concerns the order of recourse to different sorts and pieces of property of the estate, for the satisfaction of debts and other claims and rights against and in the estate. Except for a statement of the general principle applicable in most jurisdictions, that the personal property of the estate is the primary fund for the payment of debts and

(153) Cal. Code Civ. Proc. §§ 1658, 1662.

legacies, unless the contrary is indicated by the will of the decedent, it is impossible to go into this very technical subject in a work of this sort. We shall therefore omit any discussion of it.

Section 14. Accounting and Discharge of Personal Representative.

§ 184. Accounting. At a certain time after the inauguration of administration, the personal representative is required to file with the probate court and have approved by it a detailed account of all his dealings with the property in his charge, and of the condition of the estate and the progress of his administration. The time for this accounting generally is one year after the appointment; but in some jurisdictions the first accounting is required at an earlier and in others at a later date. Additional accounts at later intervals are required by statute in some jurisdictions. Furthermore, the probate court generally may, on its own motion or at the instance of some person legally interested in the administration, require an accounting at any time. Upon accounting, the personal representative should be careful to credit himself with all the expenses of administration, and to obtain special allowance of all payments of debts of the estate which have not been previously authorized by the court.

§ 185. Partial and final settlements of accounts. In some jurisdictions, upon each statutory accounting of the personal representative, all parties interested may be called into court, and the matters raised by the account may be settled once for all, as far as they concern persons properly served with notice and properly represented at

the hearing, if it is necessary that they shall be represented. Such a settlement may be overturned upon appeal to a higher court, or may be reopened or attacked for fraud, or sometimes for mistake. In some jurisdictions, however, partial preliminary accountings of the personal representative are in no sense final (154). When the administrator or executor has completed the work of administration, a final accounting is necessary, which in all jurisdictions should be made only after proper notice to all persons legally interested. The adjudication of settlement of such a final account has a similar conclusive effect, when there has been proper procedure, to that indicated above in the case of partial settlements in some jurisdictions (155).

§ 186. **Order of final distribution and discharge.** When the estate has been apparently completely administered, save for distribution to those entitled under the testator's will or under the law of intestate succession, an order will be entered by the probate court or other court having jurisdiction, for the making of such a final distribution. Upon showing compliance with this order, generally the personal representative will be entitled to an order of discharge.

§ 187. **Responsibility of personal representative after final distribution and discharge.** At common law there is no way in which one could divest himself of the office of administrator or executor, except through a removal for cause by a court of competent jurisdiction. The office

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(154) Estate of Fernandez, 119 Cal. 579; Bliss v. Seaman, 165 Ill. 422.

(155) Clyce v. Anderson, 49 Mo. 37.

is a perpetual one, and an accounting and settlement before the court can have no effect except to present the bar of former adjudication to future litigation over the matters thus authoritatively settled. If further assets are discovered after a final accounting, a formal order of discharge will not absolve the personal representative from the duty of obtaining possession of these assets and completing the administration. This is the law in some of our jurisdictions (156). In many, however, an order of discharge after final distribution has the effect of terminating the official capacity of the personal representative, and ends his responsibility with respect to the estate, except in so far as the former proceedings may be vitiated by lack of jurisdiction or proper procedure, or may be attackable for fraud (157).

§ 188. Remedy of creditors after termination of administration. Creditors, whose debts have not been barred and who have been guilty of no laches, generally may establish them against the personal representative, even after his final accounting, if his office still endures, and may obtain payment either out of after-discovered assets, or through a refund from the heirs, next of kin, or testamentary beneficiaries of the estate; or, in some jurisdictions, and necessarily in those where a discharge puts an end to the official capacity of the personal representative, such a creditor may proceed directly against the responsible distributees of the estate. The precise remedies, their conditions and limitations, vary so much and

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(156) Diversey v. Johnson, 93 Ill. 547.
(157) Willis v. Farley, 24 Cal. 490.

especially in technical detail that it is not advisable to consider them here (158).

Section 15. Administration of Estates of Living Persons.

§ 189. Administration of estates of living persons. Generally, administration of the estate of a living person who is believed to be dead is totally void. The probate court is without jurisdiction, and therefore the person acting as personal representative is not protected by its orders and decrees. He can be held as a wrong-doer for intermeddling with the property of the owner, in a civil suit brought by the latter. Likewise, others, who take the property of the supposed decedent in the course of administration, get no title good against him, except that creditors perhaps may set off their claims against the demand for the return of the payments they have received, and the pseudo personal representative may also be able to avail himself of an equitable remedy against recovery of damages by the supposed decedent, in so far as his acts have served to discharge valid debts of the latter and have thereby benefited him (159).

In some jurisdictions there are statutory provisions for the administration of the property and affairs of a person, who has been absent from the jurisdiction and not heard of for a certain number of years, and whose whereabouts are not known. It is necessary to the constitutionality of these statutes that some sort of publication of

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(158) Bullard v. Moor, 158 Mass. 418; Fisher v. Tuller, 122 Ind. 31; Dugger v. Oglesby, 99 Ill. 405.

(159) Scott v. McNeal, 154 U. S. 34.

notice be provided, as a prerequisite to the jurisdiction of the court to authorize administration (160). In some jurisdictions also it is provided that estates of criminals sentenced to life imprisonment are to be administered as though they were dead. In some their estates are subject to management in accordance with statutory provisions by officers appointed by a court, but they are not administered as are estates of decedents (161).

§ **190. Conclusion.** This chapter contains but a brief general outline of the general scope of the law of probate and of administration in our American jurisdictions (162). Necessarily, details and particular local variations have not been touched upon. No part of our law presents more local peculiarities or demands a closer study of local statutes and decisions.

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(160) Cunnius v. Reading School District, 198 U. S. 458.

(161) Knight v. Brown, 47 Me. 468.

(162) For a more extended and detailed treatment of the field covered by this article see the latest American edition of Williams on Executors and the latest edition of Woerner on Administration. Both are excellent books.

EQUITY JURISDICTION

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CHAPTER I.

HISTORY AND FUNDAMENTAL CHARACTERISTICS OF EQUITY.

§ 1. **The king's common law courts.** One who wishes to understand the place and function of a court of equity in the judicial system of England and America, must know something of its origin and of the conditions which led to its growth and development in England. After the Norman conquest, when the Anglo-Norman monarchy had been finally established upon a firm footing, the administration of justice, except in cases of comparatively small importance, came to be regarded as a prerogative of the king. Gradually there developed a system of courts (the courts of the king's bench, the common pleas and the ex-

chequer) administering what we call the common law in all ordinary cases. These tribunals, originally established by the king's authority, were in legal theory the king's courts, and did, as a matter of fact, remain under his substantial control for many centuries, the independence of the judicial from the executive department being a result obtained in England only after many centuries of constant struggle. Usually, however, and under all ordinary circumstances, they disposed of suits without any actual intervention of the king, although in legal contemplation every case between subject and subject was based upon the king's writ, "the original writ" mentioned in Part I of the article on Pleading in Volume XI of this work.

§ 2. **Common law writ.** Originally this writ had no connection whatever with the relief sought by the plaintiff, being only a general direction to the court to do right to the plaintiff; but at an early date this had been changed so that a particular writ had come to be the only appropriate way to begin an action for a particular species of wrong. These writs were issued from the chancery, over which the chancellor, who was really the king's secretary, presided. There were, then, a number of writs, each suitable to a particular state of facts complained of by the plaintiff and if the plaintiff could not make his facts fit into one of the recognized forms, he was without remedy in the common law court. Many early statutes added to the number of writs to meet particular cases, and by the well known statute of Westminster II (1285), chapter 24, it was provided that "whensoever from henceforth it shall fortune in chancery that in one case a writ is found, and in like

cases, falling under like law and requiring like remedy, is found none, the clerks in chancery shall agree in making the writ; or the plaintiffs may adjourn it until the next Parliament, and let the cases be written in which they cannot agree, and let them be referred to the next Parliament, and by consent of men learned in the law a writ shall be made, lest it may happen thereafter that the court shall for a long time fail to minister justice unto complainants." Under this statute new writs could be and were framed to fit only those cases that were similar to but not identical with cases already covered by existing writs. This statute had the effect, therefore, of remedying to some extent the failure of the common law to meet all situations demanding judicial redress, but beyond that it did not go.

§ 3. **Inadequacy of common law courts: The jury system.** It has often been supposed that had the statute of Westminster II been construed liberally instead of rather narrowly, no need for the court of equity would have existed. That this is not true will become obvious when we consider the organization and methods of procedure of the common law courts. Two features which they possessed inevitably made necessary the growth of some other tribunal so long as the common law courts remained what they were. These two things were the existence of the jury system and the character of the relief granted to the plaintiff by the court after the jury had done its work. With the development of the jury system the common law court became a divided tribunal, each part of which had is appropriate work to do. It was the func-

tion of the jury of laymen, unskilled in the law, to determine in most cases the facts; and of the judge, skilled in the law, to determine the law applicable to the facts as found by the jury. It is obvious that a case involving complicated facts or involving more than two sets of parties with varied and complicated rights could not well be handled by a jury of twelve laymen.

§ 4. **Same: Character of relief given.** In addition to the limitations thus placed upon the activities of the common law courts by the existence of the jury system, those courts were prevented from granting adequate relief in many cases because they did not undertake to order a party to the suit to do or not to do anything. If Peter sued Paul and was successful, the judgment was not an order from the court to the defendant Paul commanding him to pay Peter the amount of the judgment, upon pain of being fined or committed to jail for contempt of court if he did not obey; but it was simply a statement or determination that Paul owed Peter the sum in question. If Paul did not pay Peter, the court, through its proper officer, issued an execution against the property, or in proper cases against the person, of the defendant. What happened? Let us take as the simplest case a judgment for a sum of money recovered by Peter against Paul. Execution would be issued, if the judgment were not paid, ordering the sheriff to levy on and sell enough of Paul's property to satisfy the judgment. The sheriff would then endeavor to find property belonging to Paul subject to execution, and, if successful, would sell the same, turning over the proceeds in amount sufficient to pay the

judgment of Peter. By virtue of the execution and sale, if properly carried out, the title to Paul's property would be transferred to the purchaser at the sale, irrespective of any assent or dissent on the part of Paul, its owner. In acting in this way the common law court is said by the lawyer to act in rem, that is to deal with the thing, with the title to property, as distinguished from acting in personam, that is, upon the person, by ordering the defendant to do his duty, and punishing him for contempt in not obeying the order directed to him.

§ 5. **Disadvantages of common law procedure.** It is obvious that this plan of proceeding has its defects as well as its advantages. A few illustrations will make this clear. Suppose Peter owns a fine city residence with valuable shade trees in front. Paul, having no right to do so, is about to cut down some or all of the shade trees. What remedy at common law has Peter in such a case? Clearly no adequate remedy if the court of law confines itself, as it does in such a case, to permitting Peter to sue Paul in an action for damages after the act has been committed, and refrains from acting in personam by ordering Paul to desist from doing the act, at least until the right of the matter can be determined. In the case supposed, the court of common law must sit idly by and let Paul cut down trees which cannot perhaps be replaced short of a hundred years, and then compensate Peter as best it can when the mischief is all done, by allowing him to recover from Paul a judgment for money damages covering the depreciation in the value of his residence because,

of the wrongful act of Paul (1). The situation in the common-law court has been well described by an eminent writer as follows: "The common-law procedure is founded upon the theory that the parties to an action owe no obedience to the court. Accordingly a common-law court never redresses a wrong done to a plaintiff by laying a command upon a defendant. Thus, if a defendant in an action detains property belonging to the plaintiff, the court gives judgment that the plaintiff recover it, and thereupon issues a writ of execution directed to the sheriff, and commanding him to put the plaintiff in possession of the property, if real; if personal, to take it and deliver it to the plaintiff. But, in the latter case, if the sheriff cannot find the property, a court of common law can do nothing for the plaintiff except give him damages. The defendant may know where the property is, having purposely removed it or concealed it from the sheriff; still he cannot be ordered to deliver it to the plaintiff. So, if a defendant has refused to perform a contract, a court of common law can only give the plaintiff damages, no matter how important to the latter actual performance may be. So a defendant may threaten to do the plaintiff an irreparable injury, or he may be actually doing it, and repeating it from day to day, yet a court of common law cannot prevent it. It can only give the plaintiff damages after the injury is committed" (2).

§ 6. **Origin of court of chancery or equity.** One of the fundamental reasons, therefore, though not the only one,

(1) We do not here consider Peter's right to defend his trees by his own physical force.

(2) Langdell, Summary of Equity Pleading, xxii.

for the development of the court of equity in the English judicial procedure is to be found in the nature of the proceedings in the common law court in ordinary cases. When we add to this the existence of the jury as triers of fact, and that as a result the common law court could deal only with relatively simple cases, involving no more than two parties or sets of parties, it can readily be seen that either the common law court would have to be greatly modified both in organization and procedure, or some other tribunal developed, if justice were to be done in a great many cases. As we have already seen, under the English system, the king was regarded as the source and fountain of justice, and the courts were considered to be his courts. Inasmuch as the king's courts must necessarily, for the reasons pointed out, fail to give relief in many cases, the natural thing for an injured party to do would be to appeal to the king to remedy the injustice resulting from this situation of affairs, and this is what was done. As we have already seen, the Norman kings were not only in name "the fountains of justice" but they actually administered justice, and claimed as a part of the prerogatives the absolute power of issuing decrees in disputes between their subjects. Originally, apparently, the king, bound by his coronation oath to administer equity and justice to all, not only heard appeals from the courts, but kept interfering continually with their operations. Applications to the king for writs were made, therefore, not only in cases which had been referred to the courts, but also in many cases without any reference to the courts. These appeals were by petition, addressed either to the king alone or to

the king in council. This council of the king, which met daily, consisted of the great officers of state, i. e., the body of permanent salaried officials, chief among whom was the chancellor, who presided over it and directed its affairs. The office of chancellor, as secretary to the king, chaplain of his chapel, and keeper of the great seal, was a great office. As keeper of the great seal he was the head of the office from which the original writs, mentioned above, were issued. The petitioners, seeking the aid of the king or the king in council, when the common law refused to give relief, were generally referred for consideration and decision to the chancellor, both because of his position and because of the character of the early chancellors, who were generally great clerics and so learned men. Ultimately, in the reign of Edward III, owing obviously to the inability on the part of the king, because of the number of other matters requiring his attention, to attend in person to the numerous petitions presented to him, it was ordered that such matters should be attended to by the chancellor or by the keeper of the privy seal. The final establishment of the court of chancery, as a regular court for the administration of extraordinary relief in cases where the common law had failed, is usually regarded as being based upon this or some similar ordinance.

§ 7. **Procedure of court of equity.** An exceedingly important fact to be noted in connection with the ordinance just referred to is that thereby the king vested in the chancellor general authority to give relief in all cases whatsoever requiring the exercise of the king's prerogative in the administration of justice. Herein is found an important

difference between the chancellor's power as a court of equity and that of the common law courts. In each case the latter had to have, theoretically at least, the power to determine the case delegated by the original writ, issued from chancery and sealed with the great seal. Beginning in the manner described to exercise the prerogative power of the king in administering justice between subject and subject in cases where his courts had failed to do justice, the chancellor acquired this extraordinary jurisdiction to give relief obtainable only by the exercise of the royal prerogative. In exercising the power thus conferred, the chancellor adopted a method of procedure differing absolutely from that of the common law courts, and similar to that which obtained in the ecclesiastical courts; with which, of course, the early chancellors, being ecclesiastics, were familiar. On the petition or bill, as it came to be called, being presented, if the case called for relief, a writ was issued in the name of the king, although actually by command of the chancellor, by which the party complained of was ordered to appear before the court of chancery to answer the complaint and abide by the order that might be made. Inasmuch as this order was made by the chancellor in the name of the king, it followed that if the defendant disobeyed the order, he was in contempt of the king and was punished accordingly.

§ 8. **Development of equity as a legal system.** Originally the chancellor decided each case referred to him in accordance with his own ideas of what was just, or equitable, or conscientious, which meant in fact that the chancellor was not administering any system of law at all.

Eventually, however, the practice of looking at previous decisions of other chancellors and of developing from them general principles to be followed in similar cases before the court, was adopted. Passing over the details of this development, it may be said that the principles of equity finally took shape under Lord Hardwicke (1736-1756), Lord Thurlow (1778-1792), and Lord Eldon (1801-27). By the time Lord Eldon had finished his work, equity could be regarded as a system of rules of law, somewhat more elastic indeed and less definite than the rules of the common law, but nevertheless a body of real law. In a letter written after he had resigned the chancellorship, Lord Hardwicke wrote as follows: "Some general rules there ought to be, for otherwise the great inconvenience of jus vagum et incertum [vague and uncertain law] will follow; but yet the prætor must not be so absolutely and invariably bound by them as the judges are by the rules of the common law; for, if he were so bound, . . . he must sometimes pronounce decrees which would be materially unjust, since no rule can be equally just in the application to a whole class of cases that are far from being the same in every circumstance."

§ 9. **Equity more flexible than the common law.** As already stated, the work of "binding down the chancellor's discretion" was finished by Lord Eldon, who, says Chancellor Kent, "has secured to himself title to the reverence of his countrymen by resisting the temptation so often pressed upon him to make principle and precedent bend to the hardship of a particular case." Said Lord

Eldon himself, in the case of Gee v. Pritchard (3): "The doctrines of this court ought to be as well settled and as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed by every succeeding judge. Nothing would inflict on me greater pain than the recollection that I had done anything to justify the reproach that the equity of this court varies like the chancellor's foot." It must be added, however, that in the passage just quoted, certain words must be emphasized, if its true meaning is to be arrived at. "As well settled and uniform *almost*" says Lord Eldon, taking care that "fixed principles" are "to be applied according to the circumstances of each case," thus leaving open a loop hole of escape from that more hard and fast application of legal principles which is a characteristic of the common law courts. The retention of this liberal discretion by the equity judge must never be lost sight of by one who would understand equity, and it should further be borne in mind that the consideration of the circumstances of each case was made possible, in part at least, by the absence of a jury and the mode of procedure adopted in chancery. " 'Equity acts upon the person' is and always has been the key to the mastery of equity. The difference between judgment at law and the decree in equity goes to the root of the matter. The law regards chiefly the right of the plaintiff and gives judgment that he recover land, debt, or damages, because they

(3) 2 Swanston, 402.

are his. Equity lays stress upon the duty of the defendant and decrees that he do or refrain from doing a certain thing, because he ought to act or to forbear. It is because of this emphasis upon the defendant's duty that equity is so much more ethical than the law'' (4).

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(4) James Barr Ames, Origin and Rise of Trusts, 21 Harv. Law Rev. 261, 274.

CHAPTER II.

SPECIFIC PERFORMANCE OF CONTRACTS TO CONVEY PROPERTY.

Section 1. Extent of Jurisdiction.

§ 10. Damages at law inadequate in many cases. Upon the refusal of a party to a valid contract to carry out his agreement, a court of common law gives redress by way of money damages. It can readily be seen that in many cases relief of this character would in fact be inadequate compensation to the injured party. For example, if the contract calls for the conveyance of a certain house and lot, it may well be that no amount of money damages will be a real compensation to the buyer for the seller's refusal to convey the property in accordance with his agreement. No two pieces of real estate are exactly alike, and, unless the buyer can in some way obtain the house and lot in question, he cannot enjoy it as he expected, for example, by living in it. As we have already seen, the common law court has no machinery by which it can secure for the buyer the house and lot, unless a transfer of the title has already been made in due form. In a case of this kind, equity will grant the required relief, upon a bill asking for it, by ordering the seller to execute and deliver to the buyer the deed or deeds requisite to pass the title; in other words, it will decree the *specific per-*

formance of the contract. Strictly speaking, the court cannot after breach compel the performance specifically; that is, it cannot compel the performance at the time specified in the contract. However, it does the next best thing, by compelling the defendant to perform his agreement as nearly as may be.

§ 11. Specific performance ordinarily presupposes a valid contract at law. With certain exceptions to be noted later, the first thing to establish, in order to obtain specific performance of an agreement, is that the agreement is of the kind recognized by courts of law as being legally enforceable. That is, it must be, in the eyes of the common law courts, a contract. Originally, apparently, there was no exception to this rule, but, in the later development of equity, in certain exceptional cases which will be discussed later (§§ 39-43, below), specific performance was decreed of agreements where the circumstances were such that no action for damages for the breach of the contract could have been maintained in a court of common law.

§ 12. Specific performance of contracts to convey realty. The most important subject connected with this branch of equity is the specific performance of contracts for the purchase and sale of interests in realty. This is due to the fact that usually, in contracts of this kind, money damages are not adequate compensation to the buyer for the failure of the seller to keep his contract, while, as we shall see, the contrary is true in the cases of personal property. No two pieces of land are exactly alike, and, though in a given case two may be so similar that relief by way of money damages might in fact adequately compensate the plaintiff

for a refusal to convey one of them (inasmuch as he might buy the other, assuming it were for sale), equity nevertheless refuses to go into this question in each particular case. In other words, for purposes of convenience in administering justice, it adopts as a working rule the presumption, that, in all cases of contracts for the conveyance of interests in land, the relief at law by way of money damages is not adequate, and no investigation of the facts in the case before it will be made upon that point.

§ 13. **Specific performance of contracts for personalty occasionally granted.** As just stated, ordinarily in the case of agreements for the purchase and sale of chattels, another chattel, exactly or sufficiently similar, can be purchased in the market, and consequently specific performance of the contract is not decreed, the buyer being left to sue the seller for the damages incurred by the breach. For example, if John contracts to sell James ten shares of Union Pacific Railway stock which he then owns, but by the terms of the contract the title is not to be transferred until a later date, and the agreement is not kept by John at the time set for performance, it is obvious that, as Union Pacific stock is bought and sold on all the exchanges, James is not seriously harmed if all that the law enables him to do is to recover enough from John to enable him to buy precisely similar stock at the same total expense to himself, as if the contract had been carried out by John. If, however, in a given case, the chattel agreed to be transferred be unique, either because it is of such a character that it cannot be bought in the market, or because of other special circumstances to be stated later, it

is apparent that specific performance of the agreement would be the only adequate remedy. Accordingly we find equity ready to administer relief in these cases.

The principle, therefore, underlying the specific performance of contracts relating to land and the specific performance of contracts relating to personalty is the same, the test being, in all cases, whether damages recoverable at law are adequate or not. In the case of land, the court assumes in all cases that damages are not adequate; in the case of personal property, however, that must be affirmatively established in each case.

§ 14. **Obligations to convey or restore unique chattels.** A chattel may for sentimental reasons occasionally possess a unique value for the plaintiff, although it may be of no great pecuniary value and perhaps other very similar articles may be purchased in the open market. In a case of this kind equity will decree specific performance of a contract to convey the chattel or of a non-contractual obligation to restore it when wrongfully withheld, on the ground that any damage which the plaintiff might recover at law would be entirely inadequate to compensate him for the injury suffered by the breach of the defendant's promise. In Pusey v. Pusey (1) the article ordered delivered was an ancient horn that for time out of mind had gone along with plaintiff's estate; and similarly, in Somerset v. Cookson (2) the court decided that money damages would not compensate the plaintiff for the non-delivery of an old silver altar-piece, having a Greek

(1) 1 Vernon, 273.
(2) 3 Peere Williams, 389.

inscription and dedicated to Hercules, which had been dug up on the plaintiff's estate and wrongfully sold to defendant. In Fells v. Read (3) the article in question was a silver tobacco box of a remarkable kind which for many years had belonged to a club, and which was in the possession of the defendant, who retained the same in violation of his agreement to restore it at the expiration of a certain limited time.

Specific performance may also be decreed on the ground that the chattel is unique, as already stated, if it appears that it cannot be bought in the open market. For example paintings or statues executed by eminent artists, and similar articles, are considered in equity as being unique within the rule which permits the granting of specific performance. So also if the contract calls for the transfer of shares of corporate stock which are not listed for sale on the exchanges, and cannot easily be obtained, specific performance will be granted. For example, in the case of the New England Trust Co. v. Abbott (4), it appeared that no share of stock had ever been sold in the market, and that every shareholder had agreed with the corporation to give the corporation the opportunity of buying his stock, at a price to be fixed in a certain manner, before he sold to another. In a case in which the corporation was plaintiff, specific performance of the contract with the corporation was decreed, the value having been determined in the manner agreed upon.

§ 15. **Contracts for patented articles.** In the case of

(3) 3 Vesey, 70.
(4) 162 Mass. 148.

an agreement to furnish articles which the seller alone can supply, either because he has a patent upon the manufacture, or perhaps because he is manufacturing it according to a secret process known only to himself, specific performance will be decreed, at least in cases where the use of the article in question is necessary to the buyer in his business. For example, in Adams v. Messinger (5) specific performance was granted of a contract to furnish plaintiff with an article upon which defendant had a patent, and which could not elsewhere be obtained. Presumably, in the case of the patented article, if the manufacturer has placed the same upon sale generally and it may be purchased in the open market, specific performance would not be decreed of a contract to furnish the same, as damages at law would be entirely adequate.

§ 16. **Contracts for articles of speculative value.** In another case the contract of which specific performance was sought was for the sale of the right to dividends which might become payable from the estate of a bankrupt, that is, for the sale of a debt due from the bankrupt. The court decided that damages at law would not be adequate for the reason that no one, including the jury in the action at law, could do more than guess at the value of the right agreed to be transferred, and it would not be equitable to oblige the buyer to accept the guess of the jury as to the value of the right, in place of the thing itself (6). The principle involved in a case of this kind is clear, if we imagine a contract for the sale of a promissory note for

(5) 147 Mass. 185.
(6) Cutting v. Dana, 25 N. J. Eq. 265.

$100 signed by a man known by all to be worth millions. Under those circumstances, the value of the note is entirely fixed and definite, and a jury, in an action at law for damages for failing to transfer the note, could by the simplest possible process determine just what loss the plaintiff, the buyer, had suffered. Accordingly specific performance would clearly be denied in a case of that kind.

§ 17. **Summary.** If we glance back over our discussion, we see that in order for the plaintiff to obtain specific performance, one of two things must be true: either (1), money damages, if we assume that they can be fairly estimated, are not in their nature adequate; or (2), granting that money damages would be adequate if they could be fairly estimated, in the particular case there is no rule according to which they can be thus estimated, and if determined at all, must be fixed by mere conjecture and guess work on the part of the jury.

If either one of these is true, equity stands ready to decree specific performance, unless for other reasons to be stated later, it deems it wise to refuse such relief in spite of the inadequacy of the remedy at law.

§ 18. **Property in another jurisdiction.** Inasmuch as a court of equity deals with the person rather than with the thing, it is clear that if the court has before it the person of the plaintiff and the defendant, it may, at the request of the plaintiff, order the defendant to execute with all proper formalities, a conveyance of land situated in another state or country, enforcing its decree in the usual manner if the defendant refuses to comply. In the

leading case of Penn v. Lord Baltimore (7) Lord Chancellor Hardwicke decreed the specific performance of an obligation entered into in England concerning the boundaries of Pennsylvania and Maryland, at that time English provinces, on the ground that, as he had jurisdiction of the person of the plaintiff and defendant, it was not necessary for him to deal with the title to the land directly in any way.

§ 19. **Terms of contract uncertain.** Although the conditions set forth above are indispensable and must be satisfied if specific performance is to be obtained, yet as already suggested they are not the only conditions to be fulfilled in every case. For example, a contract for the conveyance of property, in order to be specifically enforced, must be sufficiently definite in its terms so that the court can determine the property to be conveyed. If the property cannot be identified with certainty, it is obvious that specific performance must be denied. For example, in Preston v. Preston (8) the defendant had agreed to convey a tract of land described as "adjoining the Salt Creek estate, containing about 350 acres and known as the Campbellsville tract, and also a sufficient quantity of other land adjoining the said tract to make up the quantity of 500 acres of land." Specific performance was refused as it was impossible, even with the help of witnesses, to identify the property of which conveyance was asked. So also if the property itself be identified, but the agreement leaves it doubtful how large an interest is to be conveyed—

(7) 1 Vesey Sr. 444.
(8) 95 U. S. 200.

whether a life estate or something less or more—specific performance must necessarily be denied.

§ 20. **Seller entitled to specific performance.** It is almost universally agreed by the courts that the seller may insist upon specific performance of a contract, if the buyer is entitled to do so. That is to say, if John has agreed to sell Blackacre to Peter for $5000, and Peter refuses to accept the title and pay the money, John may, assuming that he has a good title, file a bill in equity and ask for specific performance of the contract, and the court will order Peter to accept the deed and pay the money. Various reasons have been assigned for this. At first sight, perhaps, it seems to be in violation of the fundamental rule of equity, that the plaintiff cannot have relief if his remedy at law is adequate. Here the seller could sue at law and recover the excess, if any, of the sum agreed to be paid for the land above its market value at the time the contract was to be performed, leaving the seller with the land on his hands and with the profit of his bargain. Theoretically then, he could sell the land at its market price and be fully compensated for the breach of contract. We shall see however that this analysis of the situation is misleading.

The reason usually given for granting specific performance to the seller in these cases is the so-called doctrine of mutuality, which is stated to be that equity must treat both parties to the contract alike, and if it gives the buyer the right of specific performance, must do the same for the seller. This reason, however, is hardly satisfactory, and a better reason will be suggested later (§ 33, below).

§ 21. **Seller must have a good title.** The buyer, in an action brought by the seller for specific performance of his contract for the purchase and sale of property, may refuse to perform if the title the seller has to offer is doubtful and unsatisfactory. This does not mean that in order to defeat the seller the buyer must show an actual flaw in the seller's title. It is enough if he proves that the title appears to be the subject of adverse claims of such a character that the purchaser might reasonably anticipate litigation with reference to the matter. It is not sufficient, however, that there be a mere possibility of litigation, but as Alderson, B., said, there must be "a reasonably decent probability of litigation" (9). For example, if the title of the seller depends upon the proof of a fact which must be established by oral testimony, and the testimony is sufficiently conflicting so that it would have to be left to a jury, specific performance cannot be had by the seller. If, however, the probability of litigation ensuing against the buyer is not great, the court, said Lord Hardwicke, "must govern itself by a moral certainty, for it is impossible in the nature of things that there should be a mathematical certainty of a good title" (10). Whether the probability of litigation is great or small is, of course, a question of fact to be decided by the court in the determination of which no rules can be laid down, and it would therefore be useless to give further illustrations from the decisions, as any particular case is of comparatively small value in determining another, unless it be a very similar case. The basis

(9) Cattell v. Worrall, 4 Y. & C. Ex. 236.
(10) Lyddall v. Weston, 2 Atk. 19.

of the rule is however obvious, although the rule itself may be difficult of application. The buyer most certainly ought not to be compelled to buy a law suit, or even the "reasonably decent probability" of one, for that is not the contract he made.

§ 22. **Effect of deficiency in quantity or quality.** If the defect is not one affecting the validity of the seller's title, but has to do with the amount of property the seller owns, or its quality, and the defect is not a substantial one, so that the seller can substantially perform his agreement, he may compel the buyer to accept the property and pay for the same the agreed price less a suitable amount as compensation for the deficiency. For example, in King v. Bardeau (11) the agreement called for a conveyance of two lots, each 25 feet wide, one free from buildings and the other with a building upon it. It appeared that the building actually projected over upon the vacant lot some twenty inches, but that this was unknown to the seller as well as to the buyer at the time the contract was made. It was held that the seller was entitled to a decree of performance of the contract, but that a proportionate reduction must be made from the agreed price for any deficiency in value due to the projection of the building over the other lot.

If, on the other hand, the defect in quantity or quality be a substantial or material one, the buyer will not be compelled by equity to accept the conveyance of the premises, even with compensation for the deficiency. This was the

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(11) 6 Johns. Ch. 38.
(12) L. R. 14 Ch. Div. 270.

question in the case of Arnold v. Arnold (12) in which specific performance asked for by the seller was refused. It appeared that there was, between that part of the premises on which the house stood and the public highway, a long strip of land to which the plaintiff could not give title, although the contract called for its conveyance, and, as the court said, "any one who was acquainted with the property would at once see that this strip was very material" to the defendant. The principle governing these cases is well expressed, in the case just cited, by Lord Justice James, as follows: "There is no doubt that if a man purchase a property and what I may call an infinitesimal portion cannot be given him, then he may be obliged to complete with compensation. But it has never been held that a man is obliged to take a thing with compensation, when the thing is substantially and materially different from that which he was induced by the representations made to him to believe that he bought."

§ 23. **Buyer's rights when seller has imperfect title.** Although, as we have seen, the seller cannot compel the buyer to accept an imperfect title or a portion only of the amount agreed to be conveyed, except where the deficiency is so small as not to be material or substantial, it is nevertheless well settled that the buyer may, if he wishes, call upon the seller to convey an imperfect title or the fractional amount which he has, with compensation to the buyer for the failure to fully perform the agreement, subject however to the limitation stated below. For example, in Barnes v. Wood (13) where the plaintiff agreed to buy

(13) L. R. 8 Eq. 424.

the property in fee, and it turned out that the seller had only a life interest to convey, it was held that the buyer was entitled to a conveyance of what the seller had, with compensation for the deficiency. The limitation on this doctrine, referred to above, is that the deficiency may in some cases be so great that the court will feel that specific performance with compensation will result really in making a new contract for the parties, and that therefore a decree for specific performance should be refused. One of the leading cases upon this point is perhaps that of Durham v. Legard (14) in which the seller had agreed to convey an estate described as the "Kidland estate containing 21,750 acres." It turned out that the estate in question contained only 11,814 acres. The buyer being plaintiff, the court refused to decree specific performance with compensation, but held that the plaintiff could have specific performance without compensation if he so wished. It is difficult to state the principle involved in cases of this kind with any degree of definiteness. In the case just cited it was obvious to the court that to grant the specific performance with a pro rata reduction, would enable the purchaser to get for £36,000 an estate which the defendant intended to sell for £66,000 and that this result would be unfair, especially in view of the fact that the defendant, as the court found, at the time of making the contract stated truthfully to the plaintiff the value of the rental of the estate.

It should be added that the buyer will not be entitled to a decree for specific performance with compensation if

(14) 34 Bev. 611.

the seller did not profess to sell the whole, but only the estate which he was able to dispose of. For example, where the husband, with his wife, agreed to sell all the interest which he and his wife had in the lands in question, in fee simple, it was held that as the buyer knew all the time that the wife, as a married woman, was not bound by the agreement, and that the husband could not convey the whole, specific performance by the husband alone, with compensation for the deficiency in title due to the wife's failure to convey, would be denied (14a).

§ 24. **Voluntary obligations: Specific performance generally refused.** Ordinarily, with the exception noted below (§ 43), equity will not decree the specific performance of an obligation voluntarily undertaken; i. e., it will not order a defendant to perform specifically a promise for which the plaintiff has paid, or has promised to pay, nothing. According to the principles of the common law, a promise, even if made without any consideration being given for it, becomes legally binding if in a certain solemn form, namely, under seal. In fact, this form of a contract is one of the oldest forms of legally binding agreements in English law. Given a promise of this kind, the one to whom the promise is made may of course sue the maker of the same in a common law action for damages for nonperformance. Subject to the exception mentioned, however, equity will refuse relief in the way of specific performance in such a case, on the ground that inasmuch as the promisor is to get nothing for performing the promise, it is hardly fair to give to the promisee, who is to pay

(14a) Castle v. Wilkinson, L. R. 5 Chan. 534.

nothing, the extraordinary relief of specific performance. He is therefore left to his action at law for damages (14b).

§ 25. **Same: Possession and improvement of promised land.** The above mentioned exception is the peculiar doctrine of equity with respect to promised gifts of land. Ordinarily a promise to make a gift is not legally binding, i. e., it is not a contract, for it has no consideration to support it. But if A promises B to deed him a piece of land, and B goes into possession and, in reliance upon his promise and with A's assent, makes valuable and permanent improvements upon the land, it seems to be a settled doctrine of equity to compel the donor to carry out his voluntary promise, and this even though it be oral (14c). Compare § 43, below.

Section 2. Legal Consequences of Right to Specific Performance.

§ 26. **Seller a trustee for the buyer.** Elsewhere in this volume the subject of Trusts is fully discussed, and an attempt made to determine clearly what a trust is. In this place we may state in a few words the result of that investigation. A trust is said to exist whenever a person who owns anything in the nature of property, be the same tangible or intangible, is, in the eyes of a court of equity, under a duty to use the thing owned, in whole or in part, for the benefit of another person. Adopting this as the meaning of the word "trust," the seller of specific property under contract of sale, is, in those cases where speci-

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(14b) Crandall v. Willig, 166 Ill. 233.

(14c) Seavey v. Drake, 62 N. H. 393.

fic performance will be decreed, a trustee of the property in question for the buyer. This is at once obvious from a consideration of the definition given above. The seller still owns the property, but in equity is under a duty to convey it to the buyer, and in that way is under a duty to use it for the benefit of the buyer. Many important results flow from this fact, results which cannot be reached by regarding only the contract entered into by the parties.

§ 27. **Rights of buyer against transferees of seller.** The first and perhaps most striking result is that, as in the case of all trusts, the buyer may follow the property into the hands of all persons to whom the seller may have transferred the same, with the one exception of those who have purchased from the seller in ignorance of the contract, and have acquired the legal title for value. To state the matter concretely: The seller in breach of the contract sells the property and conveys the same to a third party who pays for it and takes the conveyance. In this case it is clear that the third party has made no promise to the buyer in the original contract, and that therefore there is no contract between those two parties of which equity can decree specific performance. If, therefore, the law of contracts were the only law applicable to the situation, it would be clear that the buyer would not be able to obtain from this third party under any circumstances a conveyance of the property. Remembering however that the seller in the original contract is trustee for the buyer, the principles of trusts come into play, and those principles compel the transferee, who has received a convey-

ance from the trustee, to observe the terms of the trust in the same manner that the original trustee was bound to observe them, unless the transferee be an innocent purchaser for value. The third party, if an innocent purchaser for value, holds the property free from the trust obligation. If, however, he had notice of the contract, or if he took the conveyance innocently but without paying anything for the same, he will be compelled by equity to hold the property in the same manner as the original seller, for the benefit of the buyer. The result is that the buyer in that case is entitled to a decree in equity compelling this third party to convey the property to him, he paying to the third party the purchase price agreed upon in the original contract. This relationship between the original buyer and the third party exists purely in equity, as may be seen by supposing that the buyer attempts in a court of law to bring against this third party an action based upon the contract. The complete answer to a suit of this kind would be that there is no contract between the plaintiff and the defendant.

§ 28. **Buyer entitled to proceeds of property.** Another principle of trusts is that if the trustee in breach of trust exchanges the trust property for other property, the person for whom the property is held in trust is entitled in equity to this substituted property, even though the same be of much greater value than the original property. Applying this to the case of seller and buyer, suppose, as in Taylor v. Kelly (15) the seller transfers the property, which he has agreed to convey, to an innocent purchaser

(15) 3 Jones Eq. (N. C.) 240.

for value, who pays more than the price agreed upon in the original contract. The plaintiff, in the case cited, asked for specific performance (not knowing at the time of bringing the action whether the transferee was an innocent purchaser or not) or failing that, a decree ordering the defendant, the seller, to pay to the plaintiff, the buyer, the difference between the agreed price and the amount received from the third party. The court decided that, as the transferee was an innocent purchaser for value, the plaintiff could not get the land, but was entitled to the proceeds of the land as trust property, less, of course, the agreed purchase price (which had not been paid); and an inquiry was directed for the purpose of ascertaining how much the seller had received. This result, as stated, is a very simple application of the rule that a delinquent trustee who has misappropriated the trust property holds in trust for the beneficiary of the trust all property received in exchange for the trust property. Treating the relation between the buyer and seller simply from the point of view of promisee and promisor in a contract at law, the measure of damages for breach of contract would not give the buyer the same relief. The measure of damages at law, it seems, would be the excess, if any, of the market value of the land over the agreed purchase price, a very different amount from that which the plaintiff was held entitled to recover in the case cited.

§ 29. **Descent of property upon death of buyer or seller.** In the matter of the descent of equitable interests in property, "equity follows the law," and therefore equitable interests in real estate descend to the heir. Consistently

with this, it follows that in case the buyer, who has contracted for the purchase of real estate, fails to obtain the legal title before he dies, his heir will be the one recognized in equity as having the right to call upon the seller for specific performance. However, the matter is not so simple as it seems. The personal representative (the executor or administrator) of the deceased person is liable upon contracts for the payment of the money, and the seller therefore, if the purchase price has not been paid, is entitled upon making the conveyance to recover the agreed price from the personal representative of the deceased buyer. This results in the interesting situation that the personal representative of the deceased buyer is compelled to pay out of the personal estate the purchase price, but the conveyance of the property is made by the seller, not to the personal representative, but to the heir, who thus acquires the property without paying anything for the same. On the other hand, if the seller die before the conveyance has been made, the legal title which he still held, must, as a legal proposition, descend to his heir, subject however to the trust in favor of the buyer. Here again, however, the matter is complicated by the fact that the personal representative of the deceased seller is entitled to collect all debts due the estate, including those arising out of the contracts, and so is entitled to collect and retain the price when the heir makes the conveyance. The result then in this case is that the heir of the deceased seller is compelled to make the conveyance and receive nothing, while the personal representative of the deceased who has nothing to convey, receives the price paid by the

buyer. In an action for specific performance, then, by the buyer, the seller being dead, both the heir and the personal representative of the seller are necessary parties to the action, the heir to convey the property and the personal representative to receive the money. If the action be by the seller, the buyer being dead, the necessary parties are again the heir and the personal representative, the personal representative to pay the purchase price and the heir to receive the conveyance.

Again, if the buyer die before he has received a conveyance and leaves a will devising all his real estate, the term real estate will cover not only lands to which he already had the legal title, but also lands to which he held the equitable title, including the lands for which he had contracted.

§ 30. **Rights of buyer in possession before conveyance.** If the buyer be placed in possession before the conveyance is made and the purchase price paid, he has in addition to his equitable title to the land, the possession; nevertheless he may not so deal with the property as to diminish its value below an amount which will be sufficient to secure to the seller the payment of the purchase price, in case the buyer fails to pay the same, and equity will enjoin him from doing any acts which would accomplish this result. Upon this ground, in the case of Moses Bros. v. Johnson (16), the buyer in possession, who had not paid for the land, was enjoined from cutting timber, it appearing that he was stripping the land in question of practically all the timber and selling it for firewood,

(16) 88 Ala. 517.

thereby greatly diminishing its value, the seller having no other security for the payment of the agreed purchase price.

§ 31. Rights of seller in possession before conveyance. On the other hand, inasmuch as the seller, although he remain in possession, is a trustee for the buyer and bound upon receipt of the purchase price, to convey at the time agreed, it follows that the seller has no right in equity to destroy the property in whole or in part. If he does so, he must in equity compensate the buyer to the extent of the damage, or may be restrained by injunction from doing so if the buyer brings the action in time. Thus in Holmberg v. Johnson (17) where the seller was to remain in possession and to have the use of the land for a period of years, it was held that the buyer was entitled to an injunction restraining him from quarrying and removing from the land rock, or from cutting or removing trees.

Not only must the seller refrain from actively destroying or injuring the property, but he must take active steps to keep it in repair, and is liable for a failure to use reasonable efforts in that direction. In Clarke v. Ramuz (18) the defendant, the seller, in possession, failed to take reasonable steps to prevent third persons from carting off a large portion of the surface soil of the land in question, and was held liable to compensate the buyer for the resulting injury. So in Bostwick v. Beach (19) the defendant was held liable to have deducted from the purchase price the de-

(17) 45 Kan. 197.
(18) [1891] 2 Q. B. 456.
(19) 105 N. Y. 661.

terioration in the value of the premises due to the failure to keep them in proper repair. However if the buyer ought, under the circumstances, to take possession at a certain time and fails to do so, through no fault of the seller, while this does not give the seller the right to take any active steps to injure the property he is no longer under any duty to take any active steps to preserve the property from deterioration or injury. Thus in Minchin v. Nance (20), where the buyer, mistakenly thinking the seller could not make a good title, refused to take possession and continued to refuse until after litigation extending over many years, specific performance asked for by the seller was finally decreed. In the meantime the premises had suffered great deterioration in value because of non-repair. It was held that the buyer was not entitled to any reduction from the purchase price, as he should have taken possession at the time the seller offered him possession, thirteen years before.

§ 32. **Time not of essence of contract.** In reference to these contracts for the purchase and sale of property of a kind such that specific performance will be decreed, courts of equity, as distinguished from courts of law, have a doctrine of their own concerning the necessity for the punctual performance of the promises by each of the parties. Without going into a discussion in detail of the rules which obtain in courts of law (for which the reader is referred to the article on Contracts in Volume I of this work) it is sufficient to note here that in those courts the

(20) 4 Beav. 332.

performance of a promise at the time agreed is in general insisted upon, as a necessary step before one party can complain of the failure of the other party to keep his side of the agreement. Consequently in the contracts we are considering, if the buyer has failed to pay or to offer to pay the money at the appointed time he has, as a rule, lost all right at law to demand a conveyance from the seller. This however is not true in equity. Here the view of the court is based upon a less literal reading of the terms of the contract. To be sure the parties have usually set a date for the performance by each party, but the court of equity is inclined to think that this date is not ordinarily one of the essential terms of the contract, and that it is better usually for the court to decree specific performance, allowing any compensation that is equitable because of the delay, rather than deprive the party who has been somewhat tardy in performing or offering to perform, of all remedy. This doctrine, however, has been, especially in recent years, subjected to very serious qualifications and limitations. Although it is said that ordinarily time is not of the essence, and so specific performance may be had by the plaintiff who is in default as regards time, nevertheless it may be made of the essence by stipulation of the parties in the contract itself. It has also been held that even though time is not made of the essence by the terms of the original agreement, one of the parties may make it so by serving a notice upon the other party, prescribing a time within which the agreement must be performed or abandoned. The time specified in the notice, however, must be a reasonable one, or the notice will not

have the desired effect (21). Another limitation placed upon the rule in question is that the delay shall not have been, under the circumstances, too great. For example, in one case a delay of six years was held to be too great (22). Other facts also may make it inequitable to enforce the contract, and the whole doctrine is one, the limitations of which can hardly be stated with definiteness. Of course if in any case the facts show that the plaintiff delayed because of an intention on his part to abandon the contract, he cannot afterwards call upon the other party to perform.

§ 33. **Foreclosure of buyer's equitable interest.** In view of the fact that in many cases equity will permit the buyer to ask for specific performance, even after the time set for performance, it follows that the equitable interest of the buyer remains in existence during that time. If now the buyer does not come into court and assert this equitable right, it is only fair that the seller should be permitted by equity to take active steps to put an end to the situation in which he finds himself. Technically, at law, he is the owner of the property; yet he may not deal with it as his own without being guilty in the eyes of a court of equity of a breach of trust; he will be accountable for the proceeds of the property if he sells it; he cannot cut timber upon it if it be timber land; etc. Must he patiently wait until by the lapse of time the buyer loses his right to specific performance? This obviously would

(21) A typical case involving these questions is Parkin v. Thorold, 16 Beav. 59.

(22) Combs v. Scott, 76 Wis. 662.

be a most unjust result, and it is not the law. The seller may either bring an action against the buyer for specific performance, as we have already seen above, or he may, if he prefers, bring an action analogous to that of a mortgagee to foreclose the mortgage, asking that the buyer's right to specific performance be foreclosed. In many states this is done by ordering a sale of the property and the payment to the seller, from the proceeds, of the purchase price, interest and costs, any surplus going to the buyer (23). In some jurisdictions, however, the foreclosure takes the form analogous to the old strict foreclosure of mortgages, and provides that unless the buyer pay the money due on the contract within a certain reasonable time fixed by the court, the buyer shall lose all right to call for a conveyance of the land (24).

It will be remembered that in discussing the right of the seller to specific performance, it was said (§ 20, above) that a reason for granting the same more satisfactory than the doctrine of mutuality would be pointed out later. This reason can now be stated. The seller's action for specific performance is really in the nature of an action to foreclose the equitable right of the buyer to specific performance. In other words, whether the seller asks for specific performance or seeks to foreclose the equity by a sale, the object of the suit is the same, to put an end to the situation created by equity in making the seller a trustee for the buyer, and permitting this relation to continue even after

(23) Andrews v. Sullivan, 2 Gilm. (Ill.) 327.
(24) Button v. Schroyer, 5 Wis. 598.

the time set for performance in the contract itself. Looked at from this point of view the doctrine is an entirely intelligible and satisfactory one and does not require for its support the theory of mutuality referred to.

§ 34. **Risk of loss at law is on seller.** In a court of common law, in these cases where the title has not yet been conveyed but only an executory contract for its conveyance has been entered into, the buyer is relieved from any obligation to perform where the property is accidentally destroyed in whole or in part, before the conveyance is made (25). This is because the only right of the seller at law is to recover damages from the buyer for breach of the contract, in case of a failure to perform. The buyer's promise was to pay for a certain piece of property when the same should be conveyed to him, and he is and can be guilty of no breach of his promise until the seller conveys or offers to convey to him the property contracted for. Because of the destruction in whole or in part of the property, the seller is no longer in a position to do this and cannot therefore put the buyer in default.

§ 35. **Risk of loss in equity is on buyer.** In equity, however, according to the great weight of authority, the risk of loss is on the buyer, because in equity the buyer has been treated as possessing the substantial equitable interest in the property. This is only fair, it is clear, if we recall to mind the fact that the seller can, after the contract has been entered into, no longer make a profit by selling the property to other persons, without being

(25) Wells v. Calnan, 107 Mass. 514.

in equity guilty of a breach of trust, with the result that any increase in value after the making of the contract belongs to the buyer. It is unnecessary at this time to review in detail all the rules of equity referred to above which show that the chief benefits of ownership have been conferred by equity upon the buyer so far as it was possible to do so in spite of the fact that the title had not passed. Having done this, it was not possible for equity to refrain from placing upon the buyer the burdens of ownership, including the risk of the destruction of the property.

It follows that the seller may, in spite of the injury to the property, bring an action for specific performance of the agreement, and compel the buyer to accept the same in its damaged condition, paying the full purchase price. It is assumed, in the foregoing, of course, that the destruction of the property is in no way to be attributed to any fault on the part of the seller. The case of Brewer v. Herbert (26) furnishes an example of the operation of this rule. After the execution of a written contract for the purchase and sale of a house and lot and before the date fixed for the delivery of possession and payment of the purchase money, the house was destroyed by fire without the fault of either party. The seller offered the property to the buyer who refused to receive it. In an action by the seller against the buyer, specific performance was granted. In one or two states, however, the courts, failing to appreciate the true basis of the doctrine which places the loss in equity on the buyer, have reached the opposite

(26) 30 Md. 301.

result and have refused under the circumstances stated to grant specific performance (27).

§ 36. **Right to specific performance assignable by buyer.** It was long the doctrine of the common law that a chose in action could not be transferred to another person. In accordance with this principle it is clear that the buyer could not as a legal proposition transfer to another person the right to call upon the seller for a performance of his promise to convey property. On the other hand courts of equity, in the case of trust property, had reached the conclusion that a person entitled to an equitable interest in property could transfer to another that equitable interest. If what has been stated above be true, namely, that in equity the seller, immediately upon the making of the contract becomes a trustee for the buyer, it should follow that in equity the buyer can transfer his equitable interest thus acquired to other persons, in spite of the fact that according to the law of contracts he cannot do so. Such is the law. For example, in House v. Jackson (28), it appeared that the defendant had leased the premises in question to one Haley, giving an option to him to purchase at an agreed price, at any time before the expiration of the lease. The lease and option were assigned several times and finally to the plaintiff, who claimed the right to exercise the option and tendered the agreed sum to the defendant, who refused to accept it on the ground

(27) Gould v. Murch, 70 Me. 288. See the discussion of this question in the following articles: C. C. Langdell, 1 Harv. Law Rev. 374; Samuel Williston, 9 Harv. Law Rev. 106; William A. Keener, 1 Columbia Law Rev. 1.

(28) 24 Ore. 89.

that the option was only a contract right, that is a chose in action, and could not be transferred. Specific performance was decreed, the court saying: "Haley had an [equitable] estate in the premises and was equitably the owner thereof, and could transfer this right and his assignee can enforce the option to the same extent as his assignor." From this it follows that if I have agreed to lease premises to A for a certain period, he may transfer to another person the right to call for the lease so that I will be bound to accept him as my tenant (28a). Obviously this cannot be explained upon any principle of contract law. It must be noted however that the proposed lessor may prevent this result by inserting in the contract for the lease a provision forbidding assignment.

§ 37. **Dower rights of buyer's widow.** In absence of statute, it was held originally by equity that a widow of a person entitled to an equitable interest in real estate was not entitled to dower rights in the same. By statute, or judicial legislation, however, in many if not most of the American states the widow of the beneficiary of the trust is given dower in such interest, and where this is done the courts hold unanimously that the widow of the buyer, where the title has not been conveyed before the death of the buyer, is entitled to dower in the resulting equitable interest.

§ 38. **Dower rights of seller's widow.** Where a man before his marriage enters into a contract to sell and convey land but does not execute the conveyance until after his marriage, the question arises whether his wife is en-

(28a) Buckland v. Papillon, L. R. 1 Eq. 477.

titled to dower rights in the land. On the principles of the common law it is clear that she is, as he was seized of the land after the marriage was entered into. In the case of ordinary trusts, although the legal title and seisin be in the husband, where the wife, on common law principles, is entitled to dower, equity has uniformly held that the wife will not be permitted to have dower in the trust estate. This principle equity has applied to the situation arising under a contract for the sale of land. Treating the seller as trustee for the buyer from the time of making the contract, it at once follows that the wife, who becomes such after the contract is made, will not be allowed by equity to claim, as against the buyer, dower rights in the land. Of course if the contract to convey the land is not entered into until after the marriage, that is, not until the dower rights have already attached to the land, the wife cannot by any act of her husband alone be deprived of her rights, and the rights of the buyer to specific performance would therefore be subject to her dower rights. In such a case, if the wife refuses to join with her husband in making the conveyance, the question arises whether the buyer is entitled to a conveyance of the husband's interest with compensation for the value of the wife's dower interest which the buyer failed to get; or whether he must either go without specific performance or pay the full price agreed upon for the husband's interest alone. Upon this question there seems to be a conflict of authority. In England (29) and some American states, it is held that the buyer may have a conveyance of

(29) Barnes v. Wood, L. R. 8 Eq. 424.

the husband's interest with compensation for the deficiency owing to the wife's interest. In other American cases it is held that no compensation should be allowed in such cases on the ground that the tendency of permitting a result of that kind would be to lead the husband to use his influence over his wife to procure a conveyance of her dower rights against her will (30), or that the value of the dower interest in any particular case is too conjectural (30a). See § 23, above.

§ 39. **Statute of frauds: General doctrine of part performance.** The fourth section of the English statute of frauds provides that no action shall be brought to charge a person "upon any contract of sale of land, tenements, or hereditaments or any interest in or concerning them. . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or by some person by him lawfully authorized." The substance of this statute, with some modifications as to detail, has been enacted in most of the American states. With reference to the specific performance of oral contracts for the purchase and sale of land, equity has a doctrine which does not prevail in actions at common law for damages for breach of such agreements. In a court of law, even though the contract has been in part carried out, the fact that no memorandum in writing sufficient to comply with the provisions of the statute exists, prevents an action for damages for a failure by the seller to keep the

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(30) Riesz's Appeal, 73 Pa. St. 485.

(30a) Ebert v. Arends, 190 Ill. 221.

agreement and convey the property. This however is not true in all cases in equity, although it is difficult to assign any satisfactory reason why there should be any difference between the two jurisdictions upon this subject. A court of equity equally with a court of law is bound by statutes duly passed by the legislative body. However, the usual statement is that it has always been the function of a court of equity to "prevent fraud or afford positive relief against its consequences; and this power they have no hesitation to exercise to compel the specific execution of a verbal contract to which the provisions of the statute of frauds apply, where the refusal to execute it would amount to the practice of a fraud" (31). The courts in the different jurisdictions however have never been able to agree upon the principle upon which the action is based, and the result is that the rules differ in the different states. It will therefore be necessary to classify the jurisdictions into groups. In all it is stated that there must be sufficient part performance of the contract to take it out of the statute, but the difficulty is to determine what is sufficient part performance to have this effect. It is upon that question the disagreement arises.

§ 40. **Same: Part performance by taking possession.** In one, and perhaps the largest, group of jurisdictions, the taking of possession of the premises by the buyer or lessee in pursuance of the terms of the agreement, and with the consent of the seller or lessor, is held to be enough to warrant the court of equity in allowing oral proof of the terms of the contract and so opening the way to a decree

(31) Browne, Statute of Frauds (5th ed.), sec. 437.

for the specific performance of the contract. One of the oldest cases on this point is Butcher v. Stapely (32). Many reasons have been given for this rule, but the chief seems to be that to allow a stranger to go into possession of one's premises is an act naturally to be explained upon the theory of some kind of a contract for the conveyance of some kind of an interest in the property. This may perhaps be called the "suggestive act" theory. It must however be noticed that the letting of a stranger into possession does not suggest any of the terms of the particular contract in question, but only, at the most, that there is some kind of a contract for the conveyance of some kind of an interest, but what kind must be established entirely by the oral evidence which is rendered admissible by the operation of the rule in question.

This rule also operates in the same jurisdictions in favor of the seller or lessor. If the buyer or lessee goes into possession with the acquiescence of the seller or lessor, it is held in states which, under similar circumstances, would allow the buyer or lessee specific performance, to be sufficient part performance to take the case out of the statute in favor of the seller or lessor (33).

§ 41. **Same: Remaining in possession.** Merely continuing in possession, as distinguished from entering into possession, is not however, within the meaning of this rule, sufficient part performance to take the case out of the statute. For example, if the person originally went into possession under a valid lease, the mere fact that he remained

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(32) 1 Vernon 363.

(33) Seaman v. Aschermann, 51 Wis. 678.

in possession after the expiration of that lease, even with the consent of the lessor, would not be enough, it seems, to suggest a contract for a new lease or for a sale of the premises, but might equally, it is held, suggest a mere tenancy at will or from month to month, and so does not take the case out of the statute (34). If, however, in addition to remaining in possession, the tenant, as in the case of Spear v. Orendorff (35), pays an increased rent, this is suggestive of a contract for a new lease at a higher rental, and so takes the case out of the statute. So also it is held that if a tenant who was in possession at the time of the oral contract, paid the purchase money, there is sufficient part performance to take the case out of the statute (36). It is of course necessary that the taking of possession be with the consent of the alleged seller or lessor, and if the same be continued without his consent the case is not taken out of the statute. However, if after possession has been taken without the consent of the seller, he assents expressly to the retention of possession, inasmuch as such assent is equivalent to prior consent to take possession, it seems that specific performance will be decreed.

§ 42. **Same: Paying money or rendering services.** In a few states, notably Alabama and Illinois, and perhaps Nebraska and Oregon, in addition to going into possession, the buyer must have paid the purchase price before there will be held to be sufficient part performance to permit the introduction of oral evidence in spite of the statute (37).

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(34) Emmel v. Hayes, 102 Mo. 186.
(35) 26 Md. 37.
(36) Pauling v. Pauling, 86 Hun (N. Y.) 502.
(37) Gorham v. Dodge, 122 Ill. 528.

The courts on the other hand are almost unanimous in holding that the mere payment of the purchase price without the taking of possession is not sufficient to take the case out of the statute, obviously because the mere payment of money from one man to another does not tend to suggest conveyance or leasing of lands any more than it does a thousand and one other things. So also, if according to the oral agreement the lease was to be paid for by services rendered by the buyer to the seller, and all that has taken place in part performance is the rendering of the agreed services, the case is, by the weight of authority, within the statute; clearly, again, because the fact that services have been rendered by one person to another does not in any way suggest a contract with reference to lands. A very considerable number of states however have adopted the contrary rule and allow proof of the contract by oral evidence in such cases (38), especially where the services cannot be readily valued in money.

§ 43. **Same: Erection of valuable improvements.** In a few jurisdictions it seems the taking of possession by the buyer or lessee must be followed by the erection of valuable improvements on the land in order to take the case out of the statute. Two reasons have been assigned for this view: (1) that merely taking possession does not alone sufficiently suggest a contract, but the erection of valuable buildings in addition thereto does suggest a contract, for the conveyance of the land; and (2) that it would be extremely inequitable to deprive the buyer of the land after

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(38) Maddison v. Alderson, 8 App. Cases, 467 (majority view); Carney v. Carney, 95 Mo. 353 (minority view).

he has made the permanent improvements, but it would not be so where he has done nothing more than to go into possession (39). In support of the latter reason, the court in the case cited said: "After the plaintiff had enjoyed the use of the premises for nearly ten years, and had made no improvements of any amount, and expended but $100 in necessary repairs, and had paid but a small portion of the consideration, and in all less than the value of the use and occupation, so far from having done acts for which he could have no redress if the contract were abandoned, it may have been for his advantage that the parties should not be held to the contract. If he could receive back the portion of the principal of the purchase price which he had paid, and be relieved from further payments, he would have received in the value of the use of the premises, more than double the whole amount he had expended." In connection with this reason also it has been argued in some cases that where the buyer in possession has erected valuable improvements, he is entitled to a conveyance of the land on the ground that there can be no other adequate compensation to him; but this seems to be in fact untrue. If he be allowed to recover from the seller a judgment for the amount which he has expended upon the premises, less the value of the use and occupation of the premises which he has enjoyed, and if in addition he be given a lien upon the premises to secure the amount thus found to be due, it would seem that he has been adequately compensated. This is the law in North Carolina, and several other southern states (40).

(39) Burns v. Daggett, 141 Mass. 368.

(40) Albea v. Griffin, 2 Dev. & Bat. (Eq.) 9.

CHAPTER III.

SPECIFIC PERFORMANCE OF AGREEMENTS RESTRICTING USE OF PROPERTY.

§ 44. **Restrictive agreements.** It is not uncommon, when a plot of ground in or near a city is subdivided into lots and sold for residential purposes, to put into the deeds of conveyance agreements or covenants executed by the buyers, restricting the manner in which the latter may use the land. For example it is often provided that a saloon, a stable, or an apartment house shall not be erected or maintained; that the building when built shall be at least a certain distance from the street line, and other similar restrictions. These provisions are obviously intended for the benefit of the persons owning or occupying the other lots. Suppose all the lots have been sold, one to each of a number of different persons, and each buyer has agreed with the seller, in the manner above stated, not to use the premises in certain specified ways. It must first be noted that these agreements do not, from the point of view of a court of law, amount to the reservation of what are called easements over the lots in question. See the article on Rights in Land of Another, § 70, in Volume IV of this work, for the reasons for this.

§ 45. **Specific relief: Original seller against original buyer.** Starting with the assumption that these agree-

ments do not give rise to legal easements which may be enforced in a law court, our problem is this: the person, to whom the promises were made by the various owners of the lots, is not the person primarily interested in the enforcement at the present time, as, under the assumed facts, he has sold all his holdings of real estate in the neighborhood. The people who are interested in the enforcement of these agreements are the owners of the several lots. What are their rights in the matter? In order to solve this question, we had best go back to the situation which existed after only one lot had been sold, and the buyer had entered into one of these restrictive agreements. Let us for example, call the seller Jones and the buyer Smith, and assume that Smith is about to violate or is actually violating an agreement not to maintain a saloon on his lot. Jones may sue Smith for damages, but we can readily see that the money he would thereby recover would be entirely inadequate under the circumstances. The effect the maintenance of the saloon would have on the sale of the remaining lots for residential purposes, or in the actual value to Jones himself for residential purposes, shows at once that here is a case for specific performance of the agreement. An injunction restraining Smith from violating the agreement will therefore issue at the request of Jones.

§ 46. **Same: Seller against grantees of buyer.** Suppose now that Smith sells the lot in question to Bates, and Bates buys it with notice of the agreement made by Smith with Jones not to maintain a saloon. Bates, however, opens a saloon. As a proposition of common law he is of

course not violating any contract that he made with Jones, for he made none, and, as the agreement has not created any easement, that is, any property right in his land in favor of Jones as owner of the adjoining land, Bates is simply exercising the ordinary legal rights of ownership in using the property in this way. Jones applies to a court of equity for an injunction to restrain Bates from maintaining the saloon. Should it be granted? The courts have given an affirmative answer to this question, their view being that Bates, although he purchased the legal title, did so with full knowledge that his grantor owed a duty in equity to Jones not to use the property in a certain way, and that therefore it is only fair that equity should hold him to the same duty. Had he purchased without notice, the result would clearly have been different, from this point of view. There would be nothing inequitable in him exercising his legal rights of ownership acquired thus innocently, and accordingly we find in such a case that an injunction to restrain him from doing so would be refused. In other words, one who purchases the legal title to property thus restrained, for value and without notice of the equitable agreement, takes the same free from the restriction. We must, however, hasten to add that if the deed containing the restrictive agreement was duly recorded in accordance with the provisions of the registry acts, the buyer, Bates, would be charged with constructive notice of the agreement, and would therefore be bound by its covenants. Also be it noticed, one who acquires the title without notice of the agreement but pays nothing for it, is equally bound by the agreement; it not being considered

equitable to allow one who has acquired, even though innocently, the legal interest without paying anything for it, to do anything inconsistent with the restriction to which it was subject in equity in the hands of the donor.

§ 47. **Same: Illustration.** Perhaps the leading case on this whole question is Tulk v. Moxhay, (1) in which Lord Chancellor Cottenham enjoined the defendant, who had bought with notice, from violating a covenant which provided that the "grantee, his heirs and assigns, should and would at all times thereafter keep and maintain the said piece of ground in an open state, unimproved with any buildings." The land so conveyed had passed through various hands before it finally came to the hands of the defendant, who admitted however that he had purchased with notice of the covenant. In granting the injunction, the lord chancellor said: "It is now contended, not that the vendee could violate the contract, but that he might sell the piece of land and that the purchaser from him may violate it without this court having any power to interfere. If that were so it would be impossible for the owner of land to sell part of it without incurring the risk of rendering what he retains worthless. . . . The question is . . . whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased. Of course, the price would be affected by the covenant and nothing would be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of

(1) 2 Phillips, 774.

the assignee being allowed to escape from the liability which he had himself undertaken."

§ 48. **Same: In favor of grantees of seller.** Turning now to the case with which we started our discussion, let us assume that Jones sells other lots until all in the neighborhood are sold. Evidently, as Jones has disposed of all interest in the lots, any damages that he may suffer by breach of the agreement not to use any particular lot in a certain way, can be fully compensated by a legal action, and he does not therefore, so far as his own interest in the matter is concerned, need the aid of a court of equity. In the case supposed, these restrictive agreements, however, were made for the benefit of the owners and occupiers of the various lots, and the court of equity takes the view that, where that is so, the owner for the time being of any one of the lots for whose benefits the agreements were made may obtain an injunction in equity to restrain a violation of the agreement by the owner of one of the other lots. In other words, the benefit of the agreement passes with the lots for whose benefit the agreement was made, and the burden of the agreement passes with the lot upon the use of which the restriction is placed, so long as the restricted lot does not pass into the hands of one who purchased for value and without notice, actual or constructive, of the restriction. The innocent purchaser for value, however, receives the lot free from all restrictions, though of course this case cannot arise where the agreement is recorded as part of the original deed as is usually the case. If the property does once pass into the hands of an innocent purchaser for value without notice

of the restriction, the restriction is gone forever, and any transferee from such a purchaser succeeds to the latter's rights and is not bound by the restriction. The result in the cases we have just been discussing is not altered by the fact that the lots are not all sold immediately but are disposed of at considerable intervals of time, if the intention was still the same, that is, if it appears that the restriction was intended for the benefit of the adjoining lots.

§ 49. **No relief to seller's grantee where agreement not intended to benefit land.** The case, however, is different, if there is a sale of a part of the property and the grantee enters into restrictive covenants as to the use of the portion sold, if there is no existing intention to sell the remainder, and afterward the owner sells another part. In such a case, it may be necessary to look at the condition of the latter sale in order to determine the question. For example, in Renals v. Cowlishaw (2) the owners of the Mill Hill estate conveyed to one Thatcher a piece of land adjoining this estate, subject to certain restrictive covenants. No mention was made in the conveyance that the covenants were made for the protection of the Mill Hill estate retained by the grantor. Later the grantors conveyed the Mill Hill estate to one B who conveyed to the plaintiff. In the conveyance of the Mill Hill estate, there was no reference made to the restrictive covenants in the earlier conveyance. The title to the premises transferred to Thatcher had finally become vested in the defendants, who were doing acts which violated the restrictive covenants, if the latter were binding upon them. Plaintiff, as owner

(2) L. R. 9 Ch. Div. 125.

of the Mill Hill estate, sought an injunction against the defendants. It did not appear that B or the plaintiff contracted with the original grantor for the benefit of the restrictive covenants in question, or indeed had knowledge of them at the time of the transfer to them of the Mill Hill estate. The court held that where the original conveyances containing the restrictive covenants or the circumstances surrounding the conveyance did not show that the covenants were intended for the benefit of the part retained, and the plaintiff held only a portion of the part retained, the plaintiff, if he would have the benefit of the covenant, must show that he acquired his property under an agreement with the grantor that he should have the benefit of these covenants.

§ 50. **Circumstances affecting interpretation of agreement.** Whenever it is a fair inference from the circumstances of the case, including, of course, the nature of the restrictive agreements, that they were inserted for the benefit of the reserved portion of the property, the plaintiff, as purchaser of such portion, will be entitled to the relief sought. This, for example, was the question in Peck v. Conway (3) in which the original grantor, Ensign, sold a portion of land which he owned to one Higgins, who sold the same to the defendant. The covenant was not to erect any buildings on the land, and the portion reserved by Ensign was used by him for a homestead, so that, under the circumstances, it could fairly be inferred that he imposed the restriction for the benefit of the part retained in order to have an unobstructed view from his

(3) 119 Mass. 546.

house. The plaintiff had purchased from Ensign the title to the whole of the reserved portion, without anything being said in the conveyance to him concerning the benefit of the restrictive covenants, and he sought to prevent the defendants from building in violation of the agreement. An injunction was granted, the court saying: "The question whether such an easement is a personal right or is to be construed to be appurtenant to some other estate must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances. In this case the triangular piece of land affected by the easement was a part of a large lot owned by Ensign. He retained the most of the large lot for his homestead. There is no suggestion that he had other lands in the vicinity which could be benefited by the restriction. . . . The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right in Ensign but was an easement appurtenant to the estate which he conveyed to the plaintiff." In this particular case it should be noted the defendant had constructive and not actual notice of the reservation, but he was held bound by it.

§ 51. **Agreements affecting after-acquired land.** An interesting case which reveals the true nature of the principle underlying these cases is Lewis v. Gollner (4). The plaintiff resided in a portion of Brooklyn given over to fine private residences, without flats or tenement houses.

(4) 129 N. Y. 227.

The defendant was a builder of flats and tenement houses. He bought a lot adjoining the plaintiff's premises and announced his intention to erect a seven story flat. Plaintiff and others fruitlessly remonstrated, and then negotiated with Gollner to buy the land for the sole purpose of saving the neighborhood from flats. He finally agreed to sell this property to the plaintiff and others for $24,500 upon the contract that "he would not construct or erect any flats in plaintiff's immediate neighborhood or trouble him any more." As soon as he had received the money, he bought a lot diagonally across from his first purchase, and commenced to erect a seven story flat. Being threatened with an action for this, Gollner conveyed the land in question to his wife and then as her agent continued the construction. Mrs. Gollner knew the facts and took title to aid her husband to avoid his agreement. The court held that the moment Gollner acquired the second lot, it became in his hands subject to the restrictive agreement, and that any one who thereafter bought the lot from him with notice would be also bound. In granting an injunction the court said: "I think the agreement under discussion was in substance and effect that whatever land the defendant Gollner might thereafter buy in that immediate neighborhood should be restricted in its use by him, and should not be devoted to the construction of tenements or flats. In other words, when he bought the land the plaintiff's equitable rights at once attached to it and became a burden upon it so long as Gollner owned it, so that the contract ceased to be merely and purely personal because it affects and was intended to affect the use and occupation of Gollner's after-acquired land in that neighborhood."

§ 52. **Effect of changed circumstances of neighborhood.** In the case of agreements restricting the use of land, it sometimes happens that a change in the character of the neighborhood renders the benefits to the plaintiff from an enforcement of the agreement very slight, and the pecuniary loss to the defendant very great. Here equity will not specifically enforce the restrictive agreement (5), but instead will award plaintiff any actual damage suffered through its breach, if, for any reason (as that the agreement will not run with the land at law), plaintiff has no legal remedy (6). See the article on Rights in the Land of Another, § 74, in Volume IV of this work.

§ 53. **Affirmative agreements not usually enforced against assignees.** It should be noted that the agreements which will be enforced against subsequent grantees from the original grantee (not a lessee) are restrictive in their nature, agreements to refrain from doing certain things upon or with the land. Affirmative agreements to do something upon the land, for example to erect within a certain time a house costing at least a certain sum, or to keep buildings in repair, will not be enforced specifically against subsequent assignees, even if we assume that they would have been against the original grantee. This is thought to encumber too much the ownership and transfer of land (7). The principal exceptions are agreements to act for the benefit of easements existing between two pieces of land. See the article on Rights in the Land of

(5) Trustees v. Thacher, 87 N. Y. 311.
(6) Jackson v. Stevenson, 156 Mass. 496.
(7) Hayward v. Brunswick Bldg. Society, 8 Q. B. D. 403.

Another, §§ 72, 85-88, in Volume IV of this work. For the effect, against assignees, of covenants in leases see the article on Landlord and Tenant, Chapter III, in Volume IV of this work.

§ 54. **Restrictions contrary to public policy.** Another limitation upon the general doctrine is that the restriction placed upon the property must not be unreasonable or contrary to public policy. It is frequently difficult to say just what restrictions fall within this class. The supreme court of Massachusetts, for example, in the case of Norcross v. James (8) refused to enforce a covenant not to open or work any quarry or quarries on the premises, the object of the restriction being to protect the plaintiff in the business of quarrying on another part of the land which he retained. The decision of the court, however, went not so much upon grounds of public policy, as upon the idea that the covenant in question was not for the benefit of the estate retained by the grantor, because it did not "in any way affect the use or occupation; it simply tended indirectly to increase its value by excluding a competitor from a market for its production. . . . The distinction is plain between a grant or covenant that looks to the direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned." On the other hand, a covenant not to take and sell sand from land conveyed by the plaintiff to one J. D. and by him transferred to the defendant with notice of the covenant, was specifically enforced in New York in Hodge v.

(8) 140 Mass. 188.

Sloan (9), the object being to protect the plaintiff from competition in his business of selling sand. The view of the New York court seems to be the better one and has perhaps the larger following.

§ 55. **Restrictive agreement for benefit of a business.** An interesting case, making a wider application of the principles under discussion, is that of Francisco v. Smith (10). The defendant, a baker in a certain town, had sold to Francisco his bakery business, and the good will thereof, and agreed with him that he would not, for a period of five years from the date of the sale, engage or become interested in the business of baking in that town. The plaintiff bought Francisco's interest, and the defendant, contrary to the agreement, was undertaking to engage in the business of a baker in that town. The court granted an injunction specifically enforcing the agreement, on the ground that the restriction which the defendant had agreed to upon the use of his own faculties was made for the benefit of the business, and consequently the plaintiff, the owner for the time being of the business, was entitled to the benefit of it. In other words, the business and the good will in such cases are the property for whose benefit the agreement is made, and on behalf of the owner of which the agreement will be enforced.

§ 56. **Restrictive agreements regarding sale and use of patented articles.** The patent laws of the United States reserve to the person owning the patent not only the sole right to manufacture the patented article but also the sole

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(9) 107 N. Y. 244.
(10) 143 N. Y. 488.

right to sell and use it after it has been manufactured. See the article on Patents in Volume IV of this work. In this respect there is a distinction between patent rights and rights of copyright. As the court said in one case, "the protection afforded by the patent law is broader in the case of patents than in the case of copyright. By the grant of copyright the owner of the work acquires the exclusive right of multiplication of copies; by the grant of a patent, the patentee acquires an exclusive right to make and use the thing patented. . . . The statutory right to make a patented article and to prevent others from making it is entirely distinct from the further statutory right to sell and therefore control the use of the thing made." From this it is obvious that the patentee will find it easier to impose restrictions upon the patented article in the hands of a purchaser of the same, than will the owner of the copyright in the case of a book in the hands of a purchaser. In both cases, the question has usually arisen from an attempt to control the price of a patented article or a copyrighted book when resold by the purchaser.

§ 57. **Same: Illustration.** A leading case upon the rights of the patentee is that of the Victor Talking Machine Co. v. The Fair (11). In this case the Talking Machine Company affixed to each machine which it sent out the following label: "Notice. This machine, which is registered on our books No. ..... is licensed by us for sale and use only when sold to the customer at a price not less than $..... No license is granted to use this machine when sold at a less price. Any sale or use of this

(11) 123 Fed. 424.

machine, if sold in violation of this condition, will be considered as an infringement of our United States patents under which this machine and records used in connection therewith are constructed, and all parties so selling or using this machine contrary to the terms of this license will be treated as infringers of said patents and will render themselves liable to suit and damages. This license is good only so long as this label and the above noted registered number remain upon the machine, and erasure or removal of this label will be construed as a violation of the license. A purchase is an acceptance of these conditions. All rights revert to the undersigned in event of a violation. Victor Talking Machine Co." The company, in selling the machines, filled in the number of the machine and price on the label, and sold it to a jobber who accepted and agreed to all these restrictions at the time of the purchase. The defendant, knowing of the restrictions, bought the machines from the jobber, and advertised them for sale at a price less than the price stated on the machine. The Victor Company sought an injunction to restrain the defendant from selling the machines at a price below the one fixed on the label. The argument of the defendant was that by buying the machines they had acquired a title to them as personal property, and that an attempt to restrict their right to re-sell for any price they pleased was void on the ground of public policy. In granting the injunction the court said: "Within his domain the patentee is czar. The people must take the invention on the terms he demands or let it alone for seventeen years. This is a necessity from the nature of the grant. Cries of restraint of

trade and the restriction of the freedom of selling are unavailing, because for the promotion of useful arts the Constitution and statutes authorize this very monopoly. By its terms the grant covers three separate or separable fields. The patentee may agree with one that he will not exclude him from making, with another from using, and yet another from selling, devices that employ the principle of his invention. Within the field of making, it has never been doubted, so far as we are aware, that he may subdivide as he pleases, and lease in the most fanciful parcels on the harshest terms; that whether the purchasers or tenants come or not is purely his own concern, and that if purchasers or defendants do come the courts will enforce the terms of the sale or lease. . . . The same conditions must prevail within the field of use, for how can it be distinguished?"

§ 58. **Restrictive agreements regarding sale of copyrighted articles.** With reference to similar restrictions on the re-sale of copyrighted articles, the question is not so easy of solution. By the copyright law no express right is vested in the owner of the copyright to control the use of the book or other copyrighted article (§ 56, above). See the article on Copyright in Volume IV of this work. In Bobbs-Merrill Co. v. Straus (12) the publishers printed in each book, on the title page, the following notice: "The price of this book at retail is $1 net. No dealer is licensed to sell it at a less price and a sale at a less price will be deemed as an infringement of the copyright. The Bobbs-Merrill Co." The court refused to grant an injunction

(12) 147 Fed. 15, affirmed in 210 U. S. 339.

to prevent the defendant from selling at a price less than $1, but it is not clear from the case just how far the court meant to go in its decision. The court finds in the first place that no express contract was made with the wholesalers to observe the restriction, or to restrict sales to retailers who would agree to observe them. As the copyright law, unlike the patent law, gives no right to control the use of the article after it has been sold, the only possible way, says the court, would be for the publishers to restrict the use by a contract of the kind referred to or else to reserve an interest in the title, neither of which had been done. The decision therefore still leaves the question open as to the effect of an attempt on the part of the publisher of a copyrighted book to control the price by compelling the wholesaler who buys from him to enter into a restrictive agreement that he will sell only to retailers who will agree to observe the restriction as to price, as was done in the case of the proprietary medicines discussed below (§ 60).

§ 59. **Restrictive agreements regarding use of copyright or plates for printing.** The right to control the multiplication of the copyrighted article itself is of course included in the statutory grant, and, as would be expected, we find that a restrictive agreement regarding this will be specifically enforced against successive owners of property used in connection with the copyright, like the plates for printing copyrighted matter. In Murphy v. Christian Press Association (13) the plaintiff purchased from a certain company which had a copyright of a certain book, one

(13) 38 App. Div. (N. Y.) 426.

set of electrotype plates for printing the book, the seller retaining the other set, it being agreed that both parties should have the right to publish the work in question, but it also being agreed that the retail prices of the book should be fixed at certain amounts. The company which sold the plates was dissolved, and a receiver appointed, who sold the set of plates, which the selling company had retained, to the defendant, who at the time of purchasing the same had full notice of the agreement with the plaintiff. The defendant was publishing and selling the books at a price much less than that agreed upon in the original contract. An injunction was granted restraining the defendant from violating the restriction, the court saying: "The agreement on the part of the defendant's predecessor in title, though technically a personal one, related to the use of its property, the copyrights and the plates, and obligated all who might acquire that property with notice of the agreement. This is the settled doctrine where the agreement relates to realty. We can see no reason why the same rule should not apply in the case of personal property. . . . Where the plaintiffs under the agreement . . . acquired no legal title to any part of the copyright, in equity they acquired an interest very similar to a negative [equitable] easement in real estate which [equitable] easement encumbered the property in the hands of any party who might have notice."

§ 60. **Restrictive agreements regarding sale of proprietary medicines.** A similar question has arisen in the case of attempts to maintain the price at which the retailer disposes of proprietary medicines. In Wells & Richardson

Co. v. Abraham (14) the complainant manufactured a proprietary medicine which was sold under a trademark and only to wholesale dealers, under contracts which bound them to sell only at a certain price and only to retail dealers who also had contracted with complainants fixing the price at which the medicine should be sold to consumers. The defendants, who had not entered into a contract with the complainant, had induced wholesalers to sell to them in breach of contract with complainant, and were shown to be selling large quantities of the medicines to consumers at less than the prices fixed by complainant. The court held the contracts between the complainant and the wholesalers to be legal and also the contracts between the complainant and the retail dealers. It also decided that the act of the defendants in inducing the wholesalers to break their contract was a legal wrong, and that an injunction should be issued, restraining the defendant from inducing any purchaser who had made such a contract with the complainant to violate the same by selling to defendant, and from selling such medicines now or hereafter obtained from any such person or persons. On the other hand, a contrary decision was reached upon substantially the same facts in the circuit court of appeals for another district, the agreements being held violative both of public policy at common law and of the federal anti-trust acts (15). The United States Supreme Court has yet (1909) to pass upon the question.

§ 61. Restrictive agreements concerning ordinary chat-

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(14) 146 Fed. 190.

(15) Park Co. v. Hartman, 153 Fed. 24.

tels. A restrictive agreement concerning the sale or use of ordinary chattels is generally said to be incapable of enforcement in the hands of a subpurchaser, even with notice (16). Thus, if A sells X a horse, X agreeing not to sell it again for less than $150, or not to let it be driven on Sundays, doubtless these stipulations are unenforceable against Y who has bought the animal from X with notice of the restrictions. Where, however, such an agreement would accord with ordinary business usages, without unreasonably restraining trade, it would seem enforceable. A company sold to plaintiff for a term of years the exclusive right of printing and selling books from plates owned by it. Later the company sold the plates to the defendant, with notice, and the plaintiff obtained an injunction against the defendant's violation of his exclusive right (17). It did not even appear that the matter was copyrighted, so as to be governed by the principle discussed above (§ 59).

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(16) Park Co. v. Hartman, 153 Fed. at 39.

(17) Standard Co. v. Methodist Book Concern, 33 Ap. Div. (N. Y.) 409.

CHAPTER IV.

SPECIFIC PERFORMANCE OF OTHER CONTRACTS.

§ 62. **Contracts requiring considerable action.** Thus far we have been dealing with cases in which the acts ordered to be done by the defendant have been simply to execute a deed or lease, to pay money or the like, or to refrain from certain acts altogether. Let us now consider an obligation in which the act is more complicated and requires for its execution considerable time, so that, if specific performance be decreed, it would require the exercise of considerable time and energy by a court of equity, or some officer thereof, to supervise the doing of the acts so as to be sure that they are properly done. The question is, is equity willing to undertake a task of this kind? Let us assume, for the sake of simplicity, that the existence of this difficulty is the only thing which might deter the court of equity from granting specific performance; that is, assume that no other reason for refusing specific performance exists, and that money damages at law for the breach of this particular contract will not in any fair sense compensate the plaintiff for the breach of defendant's promise. May the plaintiff obtain specific performance in such a case? As in so many branches of equity jurisdiction, here again it is difficult to lay down any precise or general rule which can be easily applied to all cases. Ordinarily,

it may be said, except where the act is a very simple one, equity is inclined to refuse to order the doing of a thing as distinguished from ordering a defendant to refrain from doing an act. Nevertheless, it seems to be true, especially according to the more recent decisions, that if the damage suffered by the plaintiff is very great and specific performance of the promise is of very considerable importance to the plaintiff, equity, although reluctant to do so, will, in such extraordinary cases, depart from its usual rule and order the defendant to carry out his contract.

§ 63. **Same: Illustrations.** Perhaps the state of the law on this point can best be seen by considering two or three of the cases to be found in the books. In Prospect Park and Coney Island Railroad Co. v. Coney Island and Brooklyn Railroad Company (1) the defendant had covenanted to run horse-cars to the plaintiff's depot to connect with its ferries and all trains, in return for which the plaintiff had granted the defendant the right to run cars over certain horse-car tracks which it owned. The agreement was to last for twenty-one years. Both parties carried out the contract for a period of years, but the defendant company, having passed into the hands of new management, broke the contract and ceased to run cars to the plaintiff's depot. The plaintiff's trains ran to and from Coney Island and the arrangement in question had undoubtedly aided the plaintiff greatly in securing additional traffic. It would also obviously be impossible to do more than guess how much the plaintiff would suffer for the remainder of the period during which the con-

(1) 144 N. Y. 152.

tract was to run, by reason of the failure of the defendant to keep its promise. Money damages, therefore, could not, in any adequate manner, be estimated, and therefore specific performance ought to be decreed, unless some weighty reason prevented. The defendant, however, resisted the application for specific performance, on the ground that equity would "not enforce the specific performance of a contract having some years to run and which required the exercise of skill and judgment and a continuous series of acts." Admitting that this was true in many cases, the court, in spite of that fact, ordered the defendant to carry out the contract. Similarly, in Hood v. Northeastern Railway Co. (2), the defendant company purchased of the plaintiff a portion of his land running through the plaintiff's estate for more than three miles, and, in consideration of the plaintiff's selling the same, covenanted and agreed to maintain on plaintiff's estate "a first class station for the purpose of taking up and setting down passengers travelling along the said railway." The company having ceased to maintain a first class station, both from the point of view of the accomodations of the station itself and from that of the number of trains which it stopped at the station, the plaintiff sought specific performance. It appearing that the accommodations furnished were about those of a third-class station, the court held that here again, although the execution of the agreement would cover years and require the exercise of skill and judgment, specific performance ought to be granted.

(2) L. R. 8 Ex. 666.

§ 64. **Same: Further illustrations.** In a great many cases, however, specific performance of contracts, where the agreement was to build buildings, has been refused, but upon examination it will be found that in most of these the plaintiff was in possession of the property, so that he could employ some one else to build the buildings and sue the defendant for any damages resulting from the refusal to perform his promise. In other words, the relief at law was adequate, or nearly so. Wherever, however, this was not true, equity has not hesitated to undertake to compel the defendant to perform his promise. For example, where the defendant railway company had purchased from the plaintiff a strip of land running through his estate, and, in consideration thereof, had promised "to build and forever maintain one neat archway sufficient to permit a loaded wagon of hay to pass under the archway at such place as the plaintiff, his heirs, and assigns, should think most convenient on his grounds, and ..... to complete the approaches to such archway," and had failed to construct the archway and approaches, a bill for specific performance was filed. In this case, the plaintiff, it appeared, had no right to go upon the land over which the archway was to be built, as the defendants were the owners of and in possession of the same, and the plaintiff would be a trespasser upon the land if he attempted to build the archway himself. For these reasons the court decided that an action at law for damages would not be adequate compensation to the plaintiff, and so rendered the decree

for specific performance (3). Had it been a case where the plaintiff was in possession of the land and could have employed an ordinary builder to erect the structure agreed upon, clearly specific performance would have been denied. For example, in the case of Fallon v. The Railroad Company (4) specific performance was denied of a contract by the defendant to erect upon lands in the possession of the plaintiff, a railway station and bridges.

§ 65. **Contracts for personal services.** It is a rule, without exception apparently, that equity will not decree the specific performance of a contract for the rendering of personal services. Assuming that the damages which could be recovered at law for a breach of the contract would not be adequate, equity considers that it is not feasible to undertake to supervise the execution of a contract of this kind. For example, suppose an artist of great reputation as a portrait painter has agreed to paint a picture of the plaintiff. No other artist of course can paint a picture like that which the defendant would paint should he perform the contract. Would it be feasible for the court to order the defendant to carry out his promise and try to assume the duty of determining, at the completion of the transaction, whether the defendant had in good faith performed his agreement? How could the court determine a question of that kind? As another example, consider a contract by a great singer to sing for a season in the opera house of the plaintiff. Obviously it would not be feasible for equity to undertake to see that

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(3) Storer v. Great Western Ry. Co., 2 Y. & C. Ch. 48.
(4) 1 Dill. (U. S.) 121.

each evening she honestly and in good faith performed the agreement. Principally for the reason, therefore, that it is not feasible for it to do so, equity refuses to undertake to order specific performance in these cases. It should also be noted, that, in many agreements for the performance of personal services, the services are of such a character that it cannot truthfully be said that damages at law are really inadequate. For example, if a great department store has a contract with an ordinary clerk to work at a certain salary for a year, it is clear that to decree specific performance of such a contract would be absurd, for all would agree that other clerks, equally as capable of filling the place, could be had for the asking, and so damages at law would be entirely adequate.

§ 66. **Same: Comparison with contracts to convey land.** Of course, strictly speaking, the services which two different people would render are never precisely alike, and, if the court were to follow the analogy of contracts for the conveyance of land, it would be bound to reach the conclusion that the services in such a case were unique, in the same way that they have decided that no two pieces of land are exactly alike. As a matter of fact, two lots of land may be so very much alike that an impartial person would see no substantial reason for choosing one in preference to the other, yet, in spite of this, the rule is well settled that equity will decree specific performance of the contract for the conveyance or leasing of one of the lots; in other words, the plaintiff is entitled to have the lot contracted for, as that lot is not precisely like any other lot in existence. Similarly, no two persons, be

they great artists or singers or not, are precisely alike, and to be consistent we ought to say that the plaintiff is entitled to have the services of the one he bargained for, and the fact that he can get others just as good should not be material. This view, however, does not seem to have been taken by the courts; and, however inconsistent it may be with the rule as to land, the cases have drawn the distinction between services which are in some substantial way of unique value to the plaintiff, and services which are not of such a character. We shall see in a moment that this distinction becomes of importance in certain cases in which the plaintiff can obtain a part but not the whole of the relief which he seeks.

§ 67. **Doctrine of Lumley v. Wagner.** Assuming that the services are, as above defined, substantially unique, and assuming further that specific performance will not be decreed, is the plaintiff left in all cases to what relief he can get at law, where the person who has promised the services breaks the contract? The cases have decided, rightly or wrongly, that the plaintiff is in some cases entitled to partial relief in equity. The question was squarely raised in the case of Lumley v. Wagner (5). The defendant, Johanna Wagner, had contracted to sing at the plaintiff's theater for a certain number of nights, and not to sing elsewhere during that period; that is, in addition to affirmatively promising to sing at the plaintiff's theater, there was an express promise not to sing elsewhere. The defendant, Wagner, broke her agreement to sing for the plaintiff, and was about to sing else-

(5) 1 DeG. M. & G. 604.

where. Lord Chancellor St. Leonards granted an injunction restraining Wagner from singing elsewhere, saying that, although he could not compel her to sing for the plaintiff, he could very easily see that she did not sing for any one else. In other words, while it was not feasible for equity to supervise her singing, it could very easily ascertain whether she had sung anywhere else, and therefore he held the injunction should be issued.

§ 68. **Doctrine criticised.** This decision has been very much criticised, and, it seems, deservedly so, for the reason that it compels the defendant to perform a part of her agreement without receiving any compensation for such part performance. According to her contract, she was entitled to no payment whatever from the plaintiff, unless she both sang at his theater and refrained from singing at any other. By obeying the injunction, therefore, she became entitled to receive nothing from the plaintiff, and only in case she performed the affirmative, as well as the negative part of the promise, could she obtain any compensation. A result of this kind seems to violate the fundamental principles underlying the whole doctrine of specific performance, one of which is that the court will not compel a defendant to perform unless it can, at the same time, compel the plaintiff to perform, or at least give the defendant assurance that the plaintiff will perform. As a matter of fact, the English courts, since this case was decided, have shown a disposition to limit the doctrine to cases where there was an express negative promise, and not merely a promise implied in fact from the surrounding circumstances. For

example, in Montague v. Flockton (6), Vice Chancellor Malins granted an injunction where there was no express provision not to act elsewhere, in a case where the terms of the contract were totally inconsistent with any other theory than that the defendant was not to act elsewhere during the term of his engagement with the plaintiff. In a later case (7), however, the English court of appeals in a similar case refused the injunction, and apparently limited Lumley v. Wagner to those cases where the agreement contained an express negative promise. It would seem that there can be, however, no legitimate ground for distinguishing between the two classes of cases, and that the latter case must be regarded as inconsistent in principle with the former case.

§ 69. **American authorities upon doctrine.** Upon the question involved in Lumley v. Wagner and these other cases, the American authorities are not numerous. In Daly v. Smith (8) the defendant, Smith, agreed to act at the plaintiff's theater for a certain period, and not to act anywhere else during that time, and it was expressly agreed that, in case she refused to act for the plaintiff, he should have the right to prevent her from acting elsewhere by paying her a sum equal to one-fourth of the salary to be paid if she acted for him. Smith having refused to act for the plaintiff, and being about to act elsewhere, an injunction was sought and obtained. To this result no exception can be taken, for here, by the ex-

(6) L. R. 16 Eq. 189.
(7) Whitwood Chemical Co. v. Hardman [1891] 2 Ch. 416.
(8) 38 N. Y. Super. 158.

press agreement of the parties, the defendant received a definite sum for performing the negative part of the contract, and of course the injunction was granted only on condition that the plaintiff pay to the defendant the amount agreed upon for the performance of the negative part of the agreement. In Duff v. Russell (9) an injunction was granted on facts similar to those in Whitwood Chemical Co. v. Hardman (note 7, above), so that, according to the New York cases, the doctrine of Lumley v. Wagner is extended to cover a negative term whether it be express or only implied in fact. Apparently the weight of authority in the United States is in favor of the doctrine of the New York court, so far as the question has been passed upon.

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(9) 16 N. Y. Super. 80.

CHAPTER V.

DEFENCES TO SPECIFIC PERFORMANCE.

§ 70. **Lack of mutuality.** To get at the problem presented by this class of cases, let us begin by considering a concrete case. The defendant has agreed in writing to convey a piece of land to the plaintiff, in return for the promise of the plaintiff to work for the defendant for one year, the conveyance to be made after the plaintiff has worked one month. The plaintiff faithfully performs the contract for the month and demands a conveyance of the land. The defendant refuses and the plaintiff seeks specific performance. Had the agreement been to pay money, equity would have been ready to decree specific performance. Will it do so where the land is to be paid for by services which in part have not yet been rendered? The rule is that equity will not, in a case of this kind, grant specific performance; and the reason usually assigned is that equity could not, if the defendant were plaintiff and the present plaintiff the defendant, order the performance of the contract for personal services, and that, therefore, it is not fair to do so when the position of the parties is reversed. In other words, the principle is stated to be that if the court will refuse, at the request of one party, to decree specific performance for any reason, it will not decree specific performance at the re-

quest of the other party. As usually stated in this way, the rule in question is subject to many qualifications and exceptions. Indeed, the exceptions are so numerous as to leave the impression that the rule is "more honored in the breach than in the observance."

§ 71. **Same: Rule restated.** An eminent writer (1), however, has suggested a restatement of the rule, which makes practically all the seeming exceptions to it simply plain applications of the rule as restated. The rule, as thus restated, is this: Equity will refuse to compel the defendant to perform, unless it can give to the defendant, at the time of the decree, assurance of specific performance by the plaintiff; that is, it is not willing to compel a defendant to do specifically a thing agreed to be done, and then leave him to sue the plaintiff at law for damages for the breach of the plaintiff's promise. The question does not depend upon whether, at the time of the making of the contract, equity could have compelled performance by the present plaintiff in the equity proceeding. If, at the time the bill seeking specific performance is filed, equity can assure the defendant of specific performance by the plaintiff, the defense of lack of mutuality is not open to the defendant. For example, if a contract is made between an infant and an adult, equity would not, during the period of infancy of the one party, decree specific performance against him. Consequently, during that period, it would not decree specific performance against the adult at the request of the infant (2). If,

(1) James Barr Ames, 3 Columbia Law Review, 1.
(2) Flight v. Bolland, 4 Russ. 298.

however, on coming of age, the infant filed a bill for specific performance of the agreement, the defense of lack of mutuality is no longer open to the adult, for the reason that the former infant is now of age. His bringing the suit for specific performance is a ratification of the contract, and he is accordingly bound to perform his side, and equity will compel the defendant to perform and will do so on condition that the plaintiff perform his side of the agreement.

§ 71a. **Illegality.** If the contract is an illegal one (see Contracts, §§ 153-81, Volume I) not yet fully executed, of course it goes without saying that neither party can obtain the assistance of a court of equity to compel specific performance by the other party, except in the rare case where the law has made the contract illegal in order to protect the plaintiff himself (see Quasi-Contracts, § 27, Volume I).

§ 72. **Fraud, misrepresentation, or concealment.** Any intentional fraud, misrepresentation, or concealment of a material fact by the plaintiff, should obviously prevent him from asking specific performance of the contract, and this is the law. But equity has gone much further than this: specific performance is an extraordinary remedy and equity will not grant it unless it seems equitable so to do, even though the contract be one which is binding at law. Lack of space fails in which to set forth the exact limits of the doctrine involved in this class of cases, but in many situations where there was no such fraud, misrepresentation, or concealment as to prevent a contract from arising, or which would lead a court of equity to order the

rescission of a contract already carried out, equity has nevertheless refused the extraordinary remedy of specific performance where the contract was still executory (3).

§ 73. Mistake. In many cases in which specific performance is asked, it happens that, according to the strict law of contracts as applied by the courts of law, the defendant has in fact made a binding contract with the plaintiff, but the evidence shows that the defendant was acting under a mistake, which, while not legally excusable, was still a mistake which a reasonable person could in good faith make. In many such cases the courts have refused to decree specific performance, saying that, although there was according to the law of contracts a valid contract between the parties, they felt that it would not be equitable to compel the defendant to perform his promise specifically, and that, therefore, they would leave the plain iff to get such damages as he could at law. For example, in Burkhalter v. Jones (4), the plaintiff, if one read the letter making the offer carefully, offered $2000 for a piece of land containing sixty acres, but the letter was so worded that a person carelessly reading it might get the impression that the offer was $35 an acre, which would make the price $2100, and the defendant, it appeared, read the letter in this way and actually understood that the offer was $2100. The court said that, while there seemed to be a contract to sell for $2000, they would refuse to decree specific performance. So, in Webster v.

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(3) For a discussion of the doctrine and its limitations, see Kelly v. Central Pacific R. Co., 74 Cal. 557.

(4) 32 Kan. 5.

Cecil (5) the defendant made a calculation of the value of the land in question on a piece of paper, and, in adding up the same hurriedly in order to get the letter off on a certain mail, accidently made the amount £1100 instead of £2100. Plaintiff received the offer by mail and accepted it. On receiving the acceptance, the defendant saw that he had made a mistake, and at once notified the plaintiff, who refused to let him off and sought specific performance, which was denied. "The plaintiff," said Sir John Romilly, "might bring such action at law as he might be advised, . . . but we can not grant specific performance and compel a person to sell property for much less than its real value and for a thousand pounds less than he intended."

§ 74. **Hardship.** It has always been true that the principles of equity have never become so fixed, so hard and fast, so rigid, as those of the common law. This is due in part to the absence of a jury in equity cases, and in part to the fact that equity acts upon the person, that is, orders him to do his duty, with the result that equity is much more ethical than the law. As a result of this, there appears in certain border-line cases a vagueness and uncertainty, which, though often annoying to a lawyer who wishes to advise a client as to his rights, is of the very essence and soul of equity, and, if not pushed too far, is very desirable in the interests of justice and fair dealing. The cases treated in the last two subsections are really illustrations of this, and the ones to which we must now turn our attention are still more obviously of this

(5) 30 Beav. 62.

character. Let us assume that, in accordance with the principles of a court of common law, the defendant has entered into a contract with the plaintiff, that the defendant has a mind capable of contracting, and that the contract is one of a kind which ordinarily a defendant would be ordered specifically to carry out. Assume further, that, under the particular circumstances, specific performance of the contract would result in extreme hardship to the defendant. Shall a court of equity aid the plaintiff, or leave him to get what damages he can at law? If the latter, where shall the line be drawn? In a number of cases a court of equity has in fact refused specific performance on this ground of hardship, but it is not possible to draw, with any exactness, the line between what is extreme hardship and what is not.

§ 75. **Same: Test of reasonableness.** Said Lord Langdale, in the leading English case (6): "I conceive the doctrine of the court to be this: that the court exercises a discretion in cases of specific performance and directs specific performance, unless it should be what is called highly unreasonable to do so. What is more or less reasonable is not a thing you can define; it must depend on the circumstances of each particular case. The court therefore must always have regard to the circumstances of each case, and see whether it is reasonable that it should by its extraordinary jurisdiction interfere to order a specific performance, knowing at the time that if it abstains from so doing a measure of damages may be found and awarded in another court. Though you cannot

(6) Wedgwood v. Adams, 6 Beav. 600.

define what may be considered unreasonable, by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." In an American case (7) the court quoted with approval the following language from the opinion in an earlier case: "However strong, clear, and emphatic the language of the contract, however plain the right at law, if the specific performance would for any reason cause a result harsh, inequitable, or contrary to good conscience, the court should refuse such a decree and leave the parties to their remedies at law." In the case just cited the court found that the officers of an improvement company, supposing they were making an advantageous sale for money, had actually made a disastrous sale for stock of doubtful value, without intending to do so. The result would be that the plaintiff would obtain land of considerable money value for stock of little money value, while the defendant company would suffer loss and be seriously crippled in its resources. In view of these facts, and without denying the existence of a valid contract, the court refused to decree a specific performance.

§ 76. **Same: Sharp bargains.** Within this doctrine are cases where the plaintiff, a shrewd and experienced man of affairs, has driven a sharp bargain with an inexperienced woman, or persons whose minds have become weakened from age or other reasons. For example, in Friend v. Lamb (8) the defendant, against whom specific

(7) Kelley v. York Cliffs Improvement Co., 94 Me. 374.
(8) 152 Pa. St. 529.

performance was sought, was a married woman, who, without previous business experience, had entered into an extremely unwise and improvident agreement. Specific performance was refused, the court saying: "We deem the contract in this case as highly improvident and rash, and most likely to result in great disaster even before the maturing of the payments, and therefore oppressive in its character. In its merely legal aspect these circumstances could not be regarded, and they would not constitute a defense to an action to recover damages for its breach. But in equity the rule is very different where the application is for the specific performance of the contract. . . . There is nothing better settled than that the decreeing of specific performance is not a matter of course but rests in the sound discretion of the chancellor. It may be refused, therefore, notwithstanding a contract obligation, if there be circumstances rendering it inequitable, and then the party seeking it is left to his action of damages. I know of no case in which specific performance is ever decreed, unless it appears to accord with good conscience that it should be so decreed, be the contract ever so specific in its terms."

§ 77. **Public inconvenience.** In Conger v. New York, etc. Railroad Co. (9) the defendant railroad company had, in consideration of a right of way across the plaintiff's land, agreed to locate a station in a certain place upon the premises and stop thereat five express trains each way daily. The court found that not only would the station be of very little use to the public, but that in ad-

(9) 120 N. Y. 29.

dition the stopping of the express trains there would delay public travel to an extent much greater than the benefit to the plaintiff would warrant, and accordingly refused to order specific performance. The court said: "The defendant is a corporation organized under the laws of the state, and is a common carrier of passengers and freight; its duties are largely of a public nature and it is bound to so run its trains and operate its road as to promote the public interest and convenience, and, in view of the fact that very little if any benefit would result to the plaintiff by the erection of a station and the stoppage of trains thereat, it appears to us that the trial court properly refused to decree specific performance and remanded the plaintiffs to their action for damages."

§ 78. **Inadequacy of consideration.** Mere inadequacy of consideration is not, in and of itself, a reason for refusing specific performance; but, coupled with other facts, it may produce one of the cases of hardship or unfairness referred to above, or, under other circumstances, it may aid in showing that a mistake was made, or that some fraud was perpetrated by the defendant, in all of which cases specific performance would be refused.

§ 79. **Specific performance impossible: Damages in lieu thereof.** If a plaintiff seek specific performance, and it turns out that, on the facts of the case, he is not entitled to it for any of the reasons we have discussed, his action is dismissed, even though he have a valid contract right against the defendant, and he must bring his action at law for damages if he wishes any relief. If, however, the

case is one in which equity is ready to decree specific performance ordinarily, but, for some reason, this has become impossible, equity will not dismiss the action, but will retain it and order the defendant to compensate the plaintiff by delivering to him the proceeds of the property, if the defendant misappropriated the same, or, if there be no proceeds to be found, by paying money in lieu thereof. This procedure, of course, may, in a given case, lead to a very different result from that which would be reached in an action at law for damages for breach of the same contract.

CHAPTER VI.

REFORMATION AND RESCISSION FOR MISTAKE.

§ 80. **In general: At law.** It happens not infrequently that, by mistake, persons who commit to writing or otherwise carry out an oral contract fail to do what they intended and the oral agreement called for; or, while accomplishing all that the agreement called for, they by mistake do more than this. In still other cases, the parties intend to do what they have done, but would not have intended to do so had they been fully aware of all the facts which had a bearing upon the situation. In all of these cases, by virtue of certain principles of the common law which we shall have occasion to set forth as we proceed, the effect often is to produce legal results wholly or in part at variance with the actual intention of the parties; but, nevertheless, results which can be undone, not by either one of the parties acting alone, but only by both of them acting in co-operation. To illustrate: The parties have agreed orally for the purchase and sale of a certain farm. A deed is duly executed and delivered by one to the other containing, as they suppose, a conveyance of the farm in question. The description of the farm is by metes and bounds, and is actually erroneous, including more than the oral agreement calls for. Both parties, however, read the deed over and thought they had cor-

rectly described the property. What is the result? To begin with, the legal effect of the deed in a court of law seems to be to convey the legal title to all of the land described to the grantee named in the deed, an effect quite at variance with the real intention of the parties. Obviously this result ought in some way to be corrected, but the court of common law never developed any machinery suitable to deal with the question. The most it could possibly do would be to allow the party, who by mistake had conveyed more than the agreement called for, to sue the other party, if he refused to reconvey it, for the value of the extra land; but secure the return of the land it could not.

§ 81. **Same: In equity.** Clearly, however, the chancellor, with his method of proceeding in personam, i. e., of ordering people to do their duty, was capable of dealing with the question. An order directing a grantee, who by mistake had received too much land, to reconvey the extra part, or directing him to deliver up the deed conveying the same and to receive a new and correct deed, would have the desired effect. Accordingly, we find one of the most important branches of the jurisdiction of equity has to do with the conditions under which equity will decree the reformation or rectification, as it is sometimes called, of a written instrument, or the rescission of a contract which has been carried out in some other way, on the ground of a mistake by one or both of the parties. We shall find it necessary to divide our discussion of the reformation of instruments and the rescission of contracts

into three parts: (1) where the mistake was mutual, and, in addition, was a mistake of fact as distinguished from a mistake of law; (2) mistake of fact made by only one of the parties; and (3) mistake of law.

Section 1. Mutual Mistakes of Fact.

§ 82. Distinction between mistake of fact and mistake of law. As indicated above we must discuss separately the cases involving mistakes of law as distinguished from mistakes of fact, for the reason that different principles have been supposed to govern the two cases. We must, therefore, at the outset, determine, if we can, what the difference is between mistakes of fact and mistakes of law. What are facts as distinguished from law? In one sense, and a very real one, the rules of law in force in any country at a given time are facts. For example, they are facts from the point of view of the historian who is writing the history of that legal system, just as much as are the names of the statesmen who lived at that time. But, for the purposes of the lawyer and the judge who have to administer justice according to these rules, there are very vital differences between those facts known as law and all other facts. Accordingly, for legal purposes, a distinction is drawn between them, and all other facts are called simply facts, and that term is denied to the rules of law. What are the facts of the lawyer as distinguished from the law? John complains of William's conduct. William has done certain things under certain surrounding circumstances. All these are, for the lawyer, facts. Can William be sued? John asks his lawyer. The

rules which determine whether any legal consequence attaches to William's conduct under the circumstances are rules of law. Or, to take another case, John has affixed his signature under certain circumstances to a written instrument of some kind. Does the instrument have any legal consequence? Is it, for example, a will or a deed? If so, what effect does it have? The rules which determine these questions are rules of law. A mistake of law, then, is a mistake made as to these rules which attach legal consequences to a given kind of conduct or state of facts. Any other mistake is a mistake of fact.

§ 83. **Same: Concrete illustration.** To illustrate concretely: In a certain case, a will was made under which certain lands were devised to A for her life, with remainders over after her death to her heirs in fee simple. In the case as it actually arose in court, the plaintiff had married A, being fully acquainted with the words in the will, and he had reached the conclusion, erroneously as we shall see, that his wife had only a life estate in the premises. Accordingly, for a consideration, he obtained a conveyance, from all of the persons who would have been the heirs of A on her death, of their supposed interests in the land. As a matter of law, however, according to the principles of real property, the legal effect of the words in the will was to vest in A what the lawyers call the fee simple in the land, and the heirs of A, or rather those who would be the heirs of A upon her death, received nothing under the will. If they ever received anything they would do so by inheritance from A on her death. The plaintiff therefore had purchased nothing.

What kind of a mistake did he make? Clearly, a pure mistake of law. In this case, if the plaintiff had reached the conclusion that those who would have been the heirs of A upon her death had interests in the land, without knowing the facts as to the words of the will, the mistake he would have made might well have been, not a mistake as to the law applicable to the facts, but a mistake as to the facts themselves.

§ 84. **Mistake in description of land conveyed.** Confining our attention to the case where the parties, in accomplishing a transaction, have made an instrument under a material mistake of fact, what relief will equity give? A and B agree to sell and buy respectively a certain lot, which they know by sight, and which they suppose to be lot 21 in block 30 of a certain plat. They are both mistaken, the real number of the lot which they have in mind being 20 instead of 21. In ignorance of this, they execute a deed from A to B describing the lot as "lot 21 in block 30," all the time having in mind the lot whose real number is 20. This deed is delivered by A to B, with intention that it shall take effect as a transfer of the title. B accepts the deed and proceeds to pay the purchase price. What is the result? The mistake in this case is of course clearly one of fact. Assuming that A owned both lots 20 and 21, it is clear that A still has the title to lot 20, the one intended by both to be transferred. On the other hand B holds a deed signed by A, using the very language A intended to use, which, however, means not what A thought it meant but something else. The common law provides no adequate remedy for this state of affairs. It requires

the co-operation of A and B to undo what has been done, and to accomplish what, according to the actual bargain, ought to be done. If, then, either refuses, the court of common law, since it does not undertake to issue commands to people to do their duty, offers no machinery adequate to deal with the situation, and resort must be had to the court of equity. It is clearly settled by all the authorities that, in the simple case supposed, equity will, at the request of either party, compel the other to aid in undoing the mistake and in carrying out the bargain as it was actually made.

§ 85. **Same: Relief against successive transferees.** In the case of Cole v. Fickett (1) the question arose as to relief where the land had passed through the hands of several parties, before the mistake was discovered. The facts in that extremely interesting case were as follows: A owned lots 20, 29, and a part of lot 149 in a certain town. These lots were known as the Carter farm. A also owned a small part of lot 148, and all of lot 21, containing about eighty acres, in the range next easterly to that in which the Carter farm lay. This latter property was known as the Friend lot. A sold to B the Friend lot, that is, lot 21 and part of lot 148. By mistake, the person who drew the deed, and who was supposed by both A and B to know the premises, described the boundaries in the deed so that only the part of lot 148 was included, but added the words "known as the Friend lot." Neither A nor B knew the numbers of the lots. B at once went into possession of lot 21 and the part of lot 148, believing that

(1) 95 Me. 265.

he had received title to both, and remained in possession nearly five years. He then sold the property to the plaintiff, executing a deed which repeated the original mistake, the intention again being to convey lot 21 and part of lot 148, but again only actually conveying part of lot 148. The plaintiff went into possession of lot 21 and part of lot 148, and was not disturbed until about a year later, when the mistake was discovered. About a month after the original conveyance by A to B, A executed a deed to C, by which he intended to convey to C the Carter farm only, but which, following the mistake in the other deed, included lot 21. C also expected to get only the Carter farm and no part of lot 21. Two years later, C sold the Carter farm to D and E, the latter expecting again to get only the land known to all as the Carter farm, but the deed from C to them again repeated the mistake, and so they received a deed actually covering lot 21 in addition to the Carter farm. Some years later D and E discovered the mistake and claimed lot 21, which was in the possession of the plaintiff. The result of this succession of errors was that D and E owned the legal title to lot 21, the Friend lot, which they never intended to buy and never paid for, and B and the plaintiff had failed to obtain the legal title to that lot, although they supposed they had done so and had paid for the same.

§ 86. **Same: (continued).** The plaintiff, in this state of affairs, sought the aid of equity in unravelling the tangle. The question was, could equity give relief, not only between the original parties to a mistake, but as against successive grantees? The court decided that it could,

and the result may be explained on the following basis: When A conveyed to B, B should have received the legal title to lot 21, and, had B then discovered the mistake, he could have had a reformation of the deed to correct the mistake. To put it in other words, A was bound in equity to convey lot 21 to B. This really amounts to saying that, in equity, A, who held the legal title to lot 21, was trustee for B of the same. A, however, by mistake, conveyed the title of lot 21 to C, but C did not pay for lot 21, but only for the Carter farm. Applying the ordinary rules of equity in the case of trusts, that a person for whom property is held in trust may follow that property into the hands of any transferee of the trustee, except one who acquires the legal title innocently and for value, C, having paid nothing for the title to lot 21, must be held as trustee of the same for B. When C by mistake again transferred the legal title of lot 21 to D and E, who again paid nothing for lot 21, but only for the Carter farm, D and E therefore became trustees for B of lot 21. Finally, B, erroneously thinking he has the legal title to lot 21, tries to convey it to the plaintiff, who of course does not acquire the title to the same, for the double reason that B has no title to give him, and that the original mistake in the description of the property was repeated in the deed to him. Plainly, however, although he did not get the legal title, he certainly did succeed to B's equitable rights to have the property held in trust for him, and so acquires a right to call on D and E to convey to him the title to lot 21.

§ 87. **Same: No reformation against bona fide holder for value.** We have not yet exhausted the interesting

facts of the case just cited. In addition to those already given, the further fact appeared that C, while he owned the legal title to the Carter farm and lot 21, mortgaged to F the whole (that is, the mortgage deed included lot 21, as well as the Carter farm, although C undoubtedly did not intend to include any part of the Kittridge lot). F apparently lent his money and took his mortgage on the basis of the legal title as it stood, relying on the description in the mortgage deed. Here was a purchaser for value of a legal right in the property, who took his interest from the holder of the legal title innocently, that is, without notice of the trust in favor of B. Applying again the ordinary rules of trusts, the court held that the mortgage to F was valid, and therefore granted no relief against him. In other words, to put the matter shortly, the "equity of reformation" for mistake, like all other equitable interests in property, is cut off as against persons who purchase the legal title to the property innocently and for value. In considering the rights of F, the mortgagee, in such a case as that cited, we must guard ourselves against confusing two different questions which are really quite different. It is apparent that F might have taken his mortgage, even with the description in the mortgage deed as it was, thinking that he was taking a mortgage only on the Carter farm. In other words, it might be that he made really the same mistake as the original parties. In such a case as that, reformation would be decreed as against him. The other situation is the one which the court believed to be the fact in the case discussed, namely, a subsequent purchaser who buys

in ignorance of the former mistake and relies simply on the description of the premises in the deed; in other words, expecting to acquire a legal interest (in the case cited) not in the Carter farm alone, but in all the property described in the deed.

§ 88. **Mistake as to subject matter of contract: Rescission.** In the case of Hitchcock v. Giddings (2) the plaintiff asked for a decree preventing the defendant from suing on a bond given by plaintiff to defendant, and to have the bond cancelled. The bond was given to secure the payment of the purchase price of an interest in land, a remainder in fee, which both parties supposed existed, but which they knew might come to an end if a certain contingency happened. Unknown to both parties, the contingency had already happened, and so the supposed conveyance from the plaintiff to the defendant actually conveyed nothing. It was held that, because of this material mistake of fact, and the resulting failure of the plaintiff to receive what he had bargained for, equity would compel the defendant to surrender the bond. In this case, had the agreement for the money not been under seal, the plaintiff would have needed no relief in equity, for, if the defendant had been suing him on the contract, he would have had the defense of no consideration for the promise to pay which he had made. In the case cited, in addition to securing a cancelation of the bond, the plaintiff obtained a decree ordering a repayment of interest on the bond which he had paid because of the mistake of fact. In other cases, the mistake was

(2) 4 Price, 135.

also as to the subject matter of the contract, but resulted in one party acquiring a much more valuable as well as a different right from that which he supposed he was getting. For example, in one case (3) the plaintiff had a policy of insurance on the life of one D, and sold the same to the defendant for a sum computed on the basis of the supposed surrender value of the policy, D being supposed by both parties to be alive. As a matter of fact D was dead. At that time, therefore, there was payable on the policy a much larger sum. The right which the plaintiff had was not only more valuable, but also a different right from that which he and the defendant supposed he had. On a bill filed for that purpose, the transfer was set aside on the ground of mistake. In the case as it actually arose, there was the additional element of lack of good faith on the part of the defendant, he having been in possession of information which led him to believe, though he did not know, that D was dead at the time he took the transfer of the policy. It would seem, however, that the case would be decided as it was without this fact. It should be noted, that, in a case of the kind just cited, the bill is not for reformation but for a rescission of the contract. That is, the court simply restores the condition of affairs as it was before the agreement of the parties was carried out, but does not compel the carrying out of another agreement, for the simple reason that there is obviously no other agreement to be carried out. For example, in this case, it is clear that the defendant never agreed to buy the matured policy at

(3) Scott v. Coulson [1903] 2 Ch. Div. 249.

its value as such, but only the policy before maturity on the basis of its surrender value.

§ 89. Mistake as to interest conveyed. In Cleghorn v. Zumwalt (4) the plaintiff supposed she had an undivided one-fifth interest in certain real estate. On the basis of this, she executed to the defendant a deed conveying all the interest she had in the property in question. She really had a three-fifths interest, and the effect of the deed therefore was to convey to the defendant that much. The defendant actually knew at the time of the conveyance that the plaintiff owned a three-fifths interest but did not disclose this to the plaintiff. Upon this state of facts, the court decreed a reformation of the deed so it would convey only the interest she supposed she was conveying. The court also expressed the view that had the defendant not known that plaintiff really owned the three-fifths interest, the same result would have been reached, as the agreement would have been to convey only the one-fifth interest and reformation would have given him just what he bargained for. Reformation rather than rescission is clearly applicable in such a case, for the bargain was not for whatever interest the plaintiff had but for a definite interest in the property.

§ 90. Mistake as to value of thing sold. Here relief is asked because of ignorance of a collateral fact, not affecting the existence or identity of the thing sold, but merely its value. In such cases it has been refused by the courts. For example, in Hecht v. Batcheller (5) the plaintiff

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(4) 83 Cal. 155.
(5) 147 Mass. 335.

bought from the defendant a note signed by a third party. The sale was made two hours after the makers of the note had made a voluntary assignment for the benefit of creditors, but the two parties to the sale were ignorant of that fact. The note was of course much less valuable than it was supposed to be, but in spite of this the court held that the plaintiff could not recover. This decision is perhaps best put upon the ground that, in a case of this kind, the fair contract is that when the plaintiff buys he assumes the risk of the maker of the note being able to pay it. He buys the liability of the maker of the note and gets what he bargains for. The rule has been applied where the plaintiff sold something which turned out to be more valuable than he supposed, because of a fact in existence at the time the contract was carried out, but of which both parties were ignorant (6).

§ 91. **Material mistake as to amount of land conveyed.** In another case, the mistake related to the number of acres in the property conveyed (7). Both parties supposed that the farm sold by the defendant to the plaintiff contained about 220 acres and possibly a little more, and the price was fixed upon that basis, that is $150 an acre for 220 acres, not counting any surplus. It turned out that there was only 206 acres, or a trifle more. The court found that the quantity of the land was the essential basis upon which the price was fixed, and decreed that the purchaser be allowed a proportionate abatement in the price. It is clear, however, that if in a given case the tract of

(6) Okill v. Whittaker, 2 Phillips, 338.
(7) Payne v. Upton, 87 N. Y. 327.

land is sold as a tract, and the quantity is not the real basis upon which the price is estimated, the opposite result would be reached. And the cases so hold, except, that if the discrepancy is very large, relief is often granted because of the hardship involved. In the case of Lawrence v. Staigg (8) the position of the purchaser was the reverse of that in Payne v. Upton. The price of the land conveyed by plaintiff to the defendant was based upon the number of square feet as ascertained by a surveyor, who made a very material mistake by reporting the area to be 43918 square feet when it was 55680 square feet. The plaintiff asked that the defendant reconvey to him and offered to return the consideration, that is, he sought rescission, because of the material mistake. Here of course he could not ask that the defendant be compelled to pay for the larger tract, as the latter had never agreed to do so, and it would be inequitable to compel him against his will to pay the larger sum. The court held, however, that although the plaintiff could not demand that the defendant pay the difference, and so was entitled only to a rescission at the most, nevertheless, it would be equitable to permit the defendant to keep the land on paying the additional value. The court said that while it could not make a new contract for the parties, it could refuse to rescind that actually made if the defendant was willing to do what seemed equitable under the circumstances, that is, pay for the additional number of square feet at the same rate.

§ 92. **Mistake as to title to real property.** In Whitte-

(8) 8 R. I. 256.

more v. Farrington (9) the plaintiff and defendant agreed to exchange land. The plaintiff conveyed to the defendant, and, according to the contract, was entitled to receive in exchange from the defendant a deed containing covenants of warranty of title to the land to be conveyed to him. The defendant, however, sent a quit-claim deed merely, which purported to convey such title as the defendant had. Instead of insisting on the defendant giving a warranty deed, the plaintiff accepted the quit-claim deed, as he had concluded upon investigation that the defendant's title was good. It turned out later that the title was defective, and the plaintiff brought a bill in equity asking for a rescission of the transaction. Relief was denied on the ground, that, by accepting the quit-claim deed, plaintiff had precluded himself from recovering. This result depends upon the peculiar rules applicable to the conveyance of title to realty. There are two forms of deeds in existence, warranty deeds and quit-claim deeds. This being so, from the fact that a quit-claim deed is offered and accepted, it is a fair inference that the defendant refuses to become responsible for the validity of his title, that the plaintiff is willing to take the risk, and cannot therefore go back of the contract. Had he not been willing to do this, it is fair to presume that he would have insisted on a warranty deed.

§ 93. **No reformation against a volunteer.** It is a general principle of equity that specific performance will not be decreed against one who has entered into an agreement not based upon a consideration. Accordingly, in

(9) 76 N. Y. 452.

Eaton v. Eaton (10), where suit was brought to reform a deed by compelling the grantor to affix a seal, and it appeared that the attempted conveyance was purely a voluntary one, that is, without any consideration, reformation was refused.

§ 94. **Manner in which equity effects reformation.** It is customary to speak of reformation being decreed by equity, as though the decree of the chancellor could of itself have the desired effect of altering the legal situation. Apparently this was the view of Vice Chancellor Bacon, who said, in the case of White v. White (11): "In my opinion a declaration that a deed ought to be rectified, followed by an order that it be rectified, apparently will be sufficient to pass the legal estate without a conveyance. If the parties desire it, I shall put my initials to the alteration as was done . . . in Stock v. Vining (11a); but I do not consider it necessary, as in my opinion the order would be sufficient without more." This view, however, was later repudiated by Sir John Romilly, who decided the case of Stock v. Vining upon which Vice Chancellor Bacon relied (12). It seems clear that, in the absence of a statute affecting the matter, the latter decision represents the only possible view of the matter. If we recall the principle that underlies all the operations of a court of equity, namely, that it deals with the person, by ordering people to perform their duty, and not with the thing or the title to the thing, it is clear that

(10) 15 Wis. 259.
(11) L. R. 15 Eq. 247.
(11a) 25 Beav. 235.
(12) Clark v. Malpas, 4 D. F. & J. 400.

the decree of the chancellor can have no legal effect whatever upon the title to the property in a court of law, unless especially empowered by statute.

Section 2. Unilateral Mistake of Fact.

§ 95. **Equitable relief usually denied.** In cases in which one party alone made the mistake of fact and the other was not a party to it and was ignorant of it, equity consistently refuses to decree reformation or rescission (13). The reason for this seems to be that the party, not making the mistake and ignorant of it, is fairly entitled to rely upon the facts as they appeared to him. On the other hand, if the defendant knows of the mistake and fails to call it to the attention of the other party, his lack of good faith in the matter furnishes a basis for equitable relief. For example, in Gun v. McCarty (14) a lease of certain premises for 99 years from plaintiff to defendant was prepared and executed, the rent being reserved in the lease at £33 10s. It appeared that the defendant knew that the plaintiff was making a mistake and that the figures were intended to be £53 10s, but the defendant said nothing about it. The court decided that reformation could not be had, on the ground that there was no contract in accordance with which the mistake could be rectified; but decreed a rescission, ordering the defendant to deliver up the lease to be cancelled. In order to be fair to all parties, however, the defendant was allowed in the settlement for valuable improvements and

(13) Doniol v. Commercial Fire Ins. Co., 34 N. J. Eq. 30.
(14) L. R. 13 Ch. Div. 304.

repairs which he had made on the premises, and was charged with an occupation rent.

§ 96. **Voluntary deed conveying too much.** If it be shown to the satisfaction of the court of equity, by suitable evidence, that a grantor by mistake executed as a gift a deed conveying a larger interest than was intended to be conveyed, it seems that a reformation of the instrument will be decreed, even though the mistake was unilateral and not known to the donee (15). If, on the other hand, the deed should by mistake convey to the donee less than the grantor intended to convey, no reformation will be granted, for to do so would be to enforce specifically an agreement for which no consideration had been paid (16). In the case of M'Mechan v. Warburton (17) the original grantor had died, believing that she had conveyed to the plaintiff a larger interest in the property than she really had. On a bill filed by the intended donee against the administrator of the original grantor, a reformation was sought by means of which the donee would acquire the interest which the grantor supposed had been transferred. It was of course clear that the administrator had, by operation of law, acquired the title to the property which the deceased supposed had been conveyed to the plaintiff. The court decreed a reformation in accordance with the intention of the original grantor, although no reformation would have been decreed against the grantor herself if she had been alive. The

(15) Andrews v. Andrews, 12 Ind. 348.
(16) German Co. v. Grim, 32 Ind. 249.
(17) L. R. Ireland, 1 Ch. Div. 435.

reason for this result is that equity considers it unconscientious for the administrator to hold the property for the next of kin in defiance of the expressed wishes of the deceased, she having died in full belief that she had vested the title in the plaintiff. Apparently the opposite result has been reached in a few cases, but the weight of authority appears to be in accord with the case cited.

Section 3. Mistake of Law.

§ 97. "Everyone is presumed to know the law." The distinction between a mistake of fact and one of law has been discussed above (§ 82). Assuming that the mistake of the parties is not one of fact, but as to the law applicable to the facts, and that as a result of the mistake the instrument executed fails to carry into effect the real intention of the parties, will equity decree reformation of the instrument to conform to the actual agreement? It seems that no valid reason can be given for refusing relief, but doubt and difficulty were introduced into the law by the opinion of Lord Ellenborough in the case of Bilbie v. Lumley (18) which is cited and discussed in the article on Quasi-Contracts, § 42, in Volume I of this work. In that case Lord Ellenborough said that every one is presumed to know the law, and that therefore a mistake of law affords no basis for relief. However, in the cases in equity dealing with reformation and rescission, both before and after Lord Ellenborough's decision, we find relief often granted where the mistake was clearly one of law. For example, in the case of Canedy v. Marcy

(18) 2 East. 469.

(19) the plaintiffs sought reformation of deeds executed by them which conveyed a larger interest than was intended. It appeared that the plaintiffs knew perfectly the words in the deed, but were misinformed as to the legal effect of those words—a pure mistake of law. A decree was entered, ordering the defendant to reconvey to the plaintiffs the interest not embraced in the real agreement of the parties.

§ 98. **Same: Contrary doctrine in equity.** In the much earlier case of Bingham v. Bingham (20) the plaintiff had purchased from the defendant premises already owned by the plaintiff, but which, because of a mistaken view of the law, the plaintiff thought belonged to the defendant. On a bill in equity the plaintiff was allowed to recover the amount paid. So also in re Saxon Life Assurance Society (21), under what was purely a mistaken view as to the legal effect of a certain transaction, the plaintiff surrendered the security which he held against the Saxon Assurance Society in exchange for a deed which proved to be a mere nullity. The court ordered the security which had been surrendered to be reinstated. Again, in Cooper v. Phibbs (22) the plaintiff sought to set aside an agreement by which he had agreed to buy an interest in a salmon fishery which it turned out he already owned. It does not clearly appear whether the plaintiff knew the facts and applied to them an erroneous rule of law, thus making a mistake of law, or whether he was not fully in-

(19) 13 Gray (Mass.), 373.
(20) 1 Vesey Sr. 126.
(21) 2 Johnson & Hemming, 408.
(22) L. R. 2 House of Lords, 149.

formed of the facts. The court treated it as a mistake of fact, Lord Westbury saying that "private right of ownership is a matter of fact." The further distinction is suggested in this case between mistakes as to the "general law, the ordinary law of the country," and a mistake in applying rules of law to determine a private right of property. The distinction seems hardly a sound one, but has been adopted in some of the cases, relief being denied only where the mistake is as to the "general law."

§ 99. **Mistake of law resulting in failure to obtain contract obligation.** In McNaughton v. Partridge (23) the plaintiffs were creditors of a partnership of which defendants were members. In settling accounts with the partnership, the plaintiffs accepted a bond which purported to bind all the partners, although in fact executed by only one of them. Inasmuch as one of the partners had no legal power to bind the other partners by an obligation under seal, only the one executing the bond was bound, although both he and the plaintiffs erroneously thought that a partner as such had power to bind the partnership by an obligation under seal. On a bill brought to correct the mistake and to charge the partners who had not executed the bond, the relief asked was granted. The cases, however, on this question are in conflict, many jurisdictions agreeing with the case cited, and others refusing relief on a similar state of facts. Indeed, in a few jurisdictions, apparently, if the mistake be purely a mistake of law, relief is refused in all cases. In any particular jurisdiction. therefore. the decisions must be

(23) 11 Ohio, 223.

examined very carefully before one can say what the law upon this question is, and no rule applicable to American jurisdictions generally can be laid down.

§ 100. Unilateral mistake of law. It seems that where the plaintiff alone makes the mistake of law, and the defendant does not share in it and is ignorant of it, no reformation or rescission can be had, the situation being in substance the same as in the case of unilateral mistakes of fact (24). If, however, the defendant knows of the mistake of law which is being made by the other party, the case is altered. In Haviland v. Willetts (25) the defendant knew of the mistake of law which was being made by the plaintiff, who was legally entitled to about $80,000 as his share of an estate; but, under the influence of the mistaken view of the law, executed to the defendant, the administrator of the estate, a release of all claims against the estate, in return for $19,000, which was a smaller sum than would have come to him had his understanding of the legal situation been correct. In a suit brought to cancel the release, it was held that whatever might be the rule in cases of mutual mistakes of law, the improper conduct of the defendant in taking advantage of the plaintiff's mistake of law furnished a basis for equitable relief by way of cancelation. However, in this case, the plaintiff, for three years after he discovered the mistake failed to object to carrying out the agreement made, and in pursuance of the same the administrator paid over large sums to the persons named in the agreement. It was held

(24) Jackson v. Olney, 140 Mass. 195.
(25) 141 N. Y. 35.

that the plaintiff had in effect authorized a gift of the money so paid to the persons to whom it had been paid, and could not recover this.

§ 101. Reformation of deeds of gift. It seems clear that, as against a donor, who has failed because of a mistake of law to convey any part of his property he intended to transfer, no reformation can be decreed, as the rule of equity which forbids the enforcement of an agreement for which no consideration has been given would apply (§ 93, above). If, however, the instrument executed by the donor conveys, because of a mistake of law, more than he intended, his right to a reformation seems clear, if relief is granted in other cases of a mistake of law in that particular jurisdiction. Clearly, also, if the mistake were discovered after his death, his heirs or next of kin would be entitled to the same relief, as it is obvious that it would be inequitable for the donee to keep from the heirs or next of kin that which the donor supposed would descend to them (26). So also, if the mistake of law which results in transferring less than the donee intends is not discovered until after his death, so that he died in the belief that title to the property in question had passed to the intended donee, it would be unconscientious for the heirs or next of kin of the donor to retain the same, and, accordingly, equity will decree that they surrender to the intended donees the legal title to the propery in question. This was in substance the question in Wyche v. Greene (27) in which the reformation asked for by the intended

(26) Stone v. Hale, 17 Ala. 252.
(27) 16 Ga. 49.

donees was granted. However, if, in the jurisdiction in which these questions arise, relief is denied in other cases of a mistake of law, as we have seen is the situation in at least a few jurisdictions, relief must also in these cases be denied (28).

Section 4. Statute of Frauds.

§ 102. Reformation denied if oral agreement is within statute of frauds. In our discussion of various cases of mistake down to the present point, we have avoided one difficulty which arises in many cases. By the statute of frauds certain classes of agreements are not legally enforceable, unless they be in writing. If the parties have, because of a mutual mistake of fact, executed a deed which does not conform to an oral bargain which falls within the prohibition of the statute of frauds, is it permissible to introduce evidence of the oral agreement and rectify the deed to conform to it? Upon this point the authorities are apparently in hopeless conflict. According to the view which prevails in many states, to do so would be to violate the plain provisions of the statute of frauds. If no deed had been executed and the plaintiff had filed a bill for specific performance of the oral agreement, relief would have been denied. How then, say these authorities, can the fact that the parties have executed a deed which does not embody the terms of the oral agreement, entitle the plaintiff to specific performance of the oral agreement—for that is what reformation amounts to? (29).

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(28) Fowler v. Black, 136 Ill. 363.

(29) Woollam v. Hearn, 7 Ves. 211; Climer v. Hovey, 15 Mich. 18.

§ 103. Same: Contrary view. On the other hand, a large number of equally respectable authorities decree reformation so that the written instrument conforms to the intention of the parties as shown by the oral agreement, even though the latter is one not legally enforceable unless it be in writing (30). It would seem that in this class of cases a sound view would have been, that, while reformation could not have been had, rescission could. Reformation does really grant specific performance of the oral agreement, but rescission would simply undo the mistake of the parties and restore the condition of affairs as it was before the mistake occurred, without in any way enforcing the agreement.

Section 5. Parol Evidence Rule.

§ 104. Reformation of deeds or leases executed by mistake. We must now reckon with another troublesome rule of law, before our discussion of reformation and rescission for mistake is complete. It has been well said that "few things are darker than this or fuller of subtle difficulties" (31). The so-called "parol evidence rule" decrees that where the parties to an agreement have executed a written instrument, intended by them to embody the terms of their contract, oral evidence is not admissible to vary in any way their rights. See Evidence, §§ 101-11, in Volume XI of this work. Suppose now, owing to a mutual mistake of fact, the written contract fails to correspond to the oral agreement. According to the clear

(30) Hathaway v. Brady, 23 California 121; Carson v. Davis, 171 Ill. 497.

(31) Thayer, Preliminary Treatise on Evidence, p. 390.

meaning of the rule, in a suit on the written contract in a court of law, no oral evidence is admissible to establish the mistake. Admitting this, suppose a suit is brought in equity for the reformation of the written instrument, does the parol evidence rule prevent relief of this kind from being granted? If so, clearly the number of cases in which reformation can be decreed is greatly limited. It seems to be clearly settled by the overwhelming weight of authority, that, if the written instrument takes the form, not of an executory contract, but of a conveyance by one party to another of an interest in property, reformation may be decreed (32).

§ 105. **Effect of writing containing executory contracts.** In the case of May v. Platt (33) it was decided that reformation of a written executory agreement to convey property for a consideration could not be decreed, without violating the rule in question. In the particular case cited, an oral agreement was first made and later a written executory contract was drawn up and signed by the parties. This written agreement, because of a mutual mistake, failed to conform to the oral agreement, that is, to the actual agreement of the parties. A deed was then executed, which followed the erroneous written contract. The court held that, unless the written contract was reformed, the deed could not be, and since the written executory contract could not be rectified, the result was that the deed could not be. This result seems absurd. Had the parties attempted to embody the oral agreement

(32) Schwass v. Hershey, 125 Ill. 653.
(33) [1900] 1 Ch. Div. 616.

directly in the deed itself and made a mistake in doing so, reformation would have been decreed. In the American case of Schwass v. Hershey (note 32, above) the opposite view is taken, and seems to be the better of the two. The parol evidence rule originated in the common law courts, and was, it would seem, connected with the mode of trying questions of fact in those tribunals. The real controversy, then, is whether a rule devised by the court of common law to meet the needs of their mode of trying facts, and which forbids the introduction of oral evidence in a suit for the enforcement of the contract, applies to suits in equity, where the mode of trying facts is entirely different, and where the object of the suit is not the enforcement of the written contract but to set it aside and substitute for it the real agreement of the parties. Here again, it would seem a valid distinction might be drawn between reformation and rescission of the written contract. In the case of May v. Platt, for example, had cancelation of the written executory agreement been decreed, without the execution of a new written agreement, there would have been left standing only the erroneous deed and the oral agreement of the parties embodying their real intention, and then, according to nearly all the authorities, the deed could have been made to conform to the actual bargain.

Section 6. Negligence or Delay of Plaintiff.

§ 106. **Negligence no bar to relief.** In Hitchins v. Pettingill (34) it was held that the fact that the plaintiff

(34) 58 N. H. 3.

was negligent in not discovering a mistake in a deed, by which ten acres less land than the oral bargain called for was conveyed, did not prevent him from obtaining relief in equity. The result reached seems on principle sound, but in one or two jurisdictions the contrary is held. The defendant in such a case has received payment for the whole of the property, and no injustice results in compelling him to convey the part omitted. The same is true if too much has been conveyed, the plaintiff seeking to obtain a reconveyance of the excess. As the defendant has actually paid only for the part intended to be conveyed, it is clear that he ought not to keep the extra part for which he has paid nothing. In the case of Banta v. Vreeland (35) a mutual mistake, by which a mortgage was canceled of record, was rectified, even though by the exercise of ordinary diligence the mistake would not have been made. On the other hand, the opposite result was reached in Conner v. Welch (36). It seems, however, that if, before the discovery of the mistake, and in reliance upon the assumed state of facts, the defendant has so altered his position that he cannot be restored to his original position if rectification be decreed, relief should be denied.

§ 107. **Negligent delay in discovering mistake.** On the ground of lapse of time, Lord Romilly, in the case of Bloomer v. Spittle (37) denied reformation after the death of the original defendant, the mistake not having been discovered until more than four years after it had

(35) 15 N. J. Eq. 103.
(36) 51 Wis. 431.
(37) L. R. 13 Eq. 427.

occurred. His opinion assumes that the plaintiff had been negligent in not discovering the mistake sooner. In many other cases relief has been granted, although the mistake was not discovered for many years—in some cases as much as twenty years, the suit being begun within a reasonable period after the discovery of the mistake, or within a reasonable time after it should have been discovered. For example, in the case of Wall v. Meilke (38) the interval between the execution of the instrument and the discovery of the mistake was about twenty years.

§ 108. **Effect of statute of limitations.** In nearly all jurisdictions, the statute of limitations, as applied to suits of this kind, does not begin to run until the mistake is discovered or ought to have been discovered by the plaintiff seeking relief (39).

§ 109. **Delay in seeking relief after discovering mistake.** After the discovery of the mistake, the one desiring reformation, if the other party refuses to rectify without suit, must, independently of any question of the statute of limitations, invoke the aid of a court of equity within a reasonable time or relief will be denied. In the case of Sable v. Maloney (40) the court found that under the circumstances there had been an unreasonably long delay in bringing the suit after the discovery of the mistake, and therefore dismissed the bill.

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(38) 89 Minn. 232.
(39) Maldaner v. Beurhaus, 108 Wis. 25.
(40) 48 Wis. 331.

CHAPTER VII.

REFORMATION AND RESCISSION FOR MISCONDUCT.

SECTION 1. FRAUD AND MISREPRESENTATION.

§ 110. Necessity for equitable relief. Conveyance of realty. In this chapter we have to deal with cases in which a plaintiff seeks the aid of a court of equity to undo a transaction already completed and carried out, the request for relief being based upon fraud, misrepresentation, duress, undue influence, or illegality. We must therefore remember that these grounds may and do operate differently here than they do where they are set up as a defense to an action for specific performance of an executory agreement. In the action for specific performance, the defendant is simply asking the court to refuse to compel him to do something, but in the cases before us the plaintiff, on one of the grounds mentioned, asks for affirmative relief in undoing what has already been done. Bearing this in mind, let us consider briefly the reasons why equity must deal with many cases of fraud. A has received $10,000 for land which he has conveyed to B, being induced to enter into the transaction by fraud on B's part. The fraud does not in a court of common law prevent the conveyance from taking effect. The common law contents itself with asking whether A executed the instrument of conveyance, knowing its contents, and

delivered it to B with intent to pass title. If so, title has passed and no power exists in a court of common law to undo the transaction. An action for damages by the defrauded seller against the fraudulent buyer is the only common law remedy. At an early period, however, the chancellor intervened in such cases, and stood ready, on proof of the fraud, to order B to re-convey to A, on condition that A restore to B what he had received in exchange for the land. The bill in equity in such a case does not proceed upon the theory that a rescission has already taken place, i. e., that A has rescinded, but, on the contrary, is based upon a right of A's to have a rescission brought about by equity. It is a figure of speech to say that equity rescinds a contract. The court of equity brings about a rescission by compelling B to co-operate with A, i. e., by ordering B to execute and deliver to A a deed reconveying the property to A. When this is done, the title passes back to A, and the transaction is actually rescinded. This being so, it is clear that it is not necessary for A, in the case supposed, to offer to return the money received from B before he files his bill in equity, for to require him to do that would be to compel him to repay B and trust B to reconvey. All he need do, therefore, is to offer in his bill to repay the money received, and the decree of the court requires reconveyance and repayment as concurrent acts.

§ 111. **Conveyance of personal property induced by fraud.** If the property conveyed be personalty, the necessity for equitable relief ought on principle to be the same as in the case of real estate, but as the law stands the com-

mon law courts have permitted actions at law which are really substitutes for bills in equity. A defrauded seller of personal property may, it is said, rescind the contract and sue either to recover the specific property in replevin, or its value in an action of trover (1). It is well recognized, however, that these actions at law are to be dealt with upon equitable principles. For example, in the case of real estate, it is well settled that if B transfers the property to C, an innocent purchaser for value who knows nothing of the fraud, the latter gets the legal title free from any equitable rights of A. Apparently the law is well settled that the same result attaches in the case of personal property (2).

§ 112. Cancelation of obligations obtained by fraud. In a later chapter upon bills quia timet (3) we shall deal with the rescission by cancelation of contracts in writing and under seal entered into because of the fraud of the defendant. The rescission is brought about by ordering the instrument to be delivered up to be canceled. The jurisdiction of equity was necessary in these cases because originally the whole question of fraud was left by the common law courts for the chancellor to deal with. For centuries it was at common law no defense to a suit on a sealed instrument that it had been obtained by the fraud of the obligee, and the only remedy lay in equity, in the form of a bill to enjoin any suit on the same and for its delivery into court to be canceled. Later, however,

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(1) Thurston v. Blanchard, 22 Pick. (Mass.) 18.
(2) Thurston v. Blanchard, note 1, above.
(3) Chapter X, below.

fraud was adopted in the common law court as a legal defence to the suit on the sealed instrument (4), but there still remained certain problems raised and discussed in the chapter referred to, in those cases in which the obligee was not as yet suing on the instrument. Originally, therefore, the only question in equity was that of fraud, and the right to cancelation existed if the fraud were proved; but, after the introduction of fraud as a legal defence, the jurisdiction of equity became narrower, so that cancelation came to depend upon the principles of bills quia timet, which are set forth in Chapter X, below.

§ 113. **Equitable relief where legal relief adequate.** As already stated, originally the common law courts refused to deal with the question of fraud at all, leaving it for equity; but later recognized, in part at least, fraud both as giving a right of action for damages and as a legal defence to a suit. This being so, the question arises, whether equity will continue to give relief where originally the relief at law was not adequate, but has become so in the course of the development mentioned. It seems that in England the existence of the relief at law is no ground for equity's refusing to deal with the question, but that, in many jurisdictions in this country, it is a reason, if not for denying jurisdicton to equity, at least for a refusal to exercise it. In Buzard v. Houston (5), for example, the plaintiffs in their bill in equity alleged that they had one contract with the defendants; that, by virtue of certain fraudulent representations of defendants, they

(4) J. B. Ames, 9 H. L. R. 51.
(5) 119 U. S. 347.

were induced to surrender that contract and accept in lieu of it another, whereby they had been damaged to the extent of many thousands of dollars; and asked for a cancelation of the obligation signed by plaintiffs, which defendant held by virtue of the second contract, for the reinstatement of the first contract, and for a decree that defendants pay plaintiffs the damages suffered. The court held that plaintiffs had a full and adequate remedy at law for damages, in an action of deceit, and dismissed the bill. The particular case in question was a complicated one on its facts, and it was not entirely clear that plaintiff had an adequate remedy at law, Mr. J. Bradley dissenting from the result on that ground. It stands, however, for the proposition, that if the remedy at law is adequate today, equitable relief will be refused. This result is reached especially in those jurisdictions in which the equity powers of the court depend upon special statutory or constitutional grants, as in Massachusetts, Maine, and the Federal courts.

§ 114. **Relief granted against subsequent transferees.** A typical case showing the manner in which equity deals with the situations created by transfers of property induced by fraud is that of Free v. Buckingham (6). The bill in that case alleged that plaintiff conveyed the real estate in question to B, being induced by the latter's fraudulent misrepresentations, and that the other defendants had obtained title to portions of the land by conveyance from B, all having acquired title with knowledge of the infirmity of B's title. Under such circumstances, the

(6) 57 N. H. 95.

court would decree reconveyance by all except innocent purchasers for value from B, and they were therefore all properly made defendants in the equity proceedings. This is, of course, only an application of the fundamental principle of equity which permits the beneficiary of a trust to follow the trust property into the hands of all transferees from the trustee, with the one exception of innocent purchasers for value (7).

§ 115. **The conception of fraud.** The most difficult question to settle in connection with these cases is that connected with the conception of fraud itself. What, in the eyes of a court of equity, amounts to fraud sufficient to justify a rescission? Of course, many cases are too clear to require discussion. A misrepresentation of a fact, made under such circumstances that if acted upon to one's damage a tort action for deceit would lie, will of course be recognized as fraud. It is an element of such action, however, that the defendant made the statement wilfully, i. e., knowing that it was false, or else was culpably ignorant of the truth (8). What shall we do with the cases where the defendant was ignorant that he was misrepresenting the facts, though not culpably so; but, nevertheless, his untrue representations, his innocent misrepresentations, actually induced the plaintiff to transfer the property? These problems it seems better to treat separately (§ 121, below) as "innocent misrepresentation," reserving the term "fraud" for those cases to which it seems more naturally to apply; and accordingly

(7) See the article on Trusts elsewhere in this volume.

(8) Webb's Pollock on Torts, 355; Derry v. Peek, L. R. 14 App. Cas. 337.

we shall follow that method of treatment. Granting this, let us note first of all that "a man's state of mind is as much a fact as the state of his digestion," and that a misrepresentation of one's intentions is a fraudulent misrepresentation sufficient to authorize rescission. Such a case is found in Wampler v. Wampler (9), in which it was alleged that defendant obtained from the plaintiff the property in question by promising to support and care for the plaintiff and his wife, and that these promises were made fraudulently and for the fraudulent purpose of obtaining the property, i. e., with no intention to carry them out. The court held this to be fraud justifying a rescission. It is not fraud for a man to break his contract, but it is fraud for him to enter into a contract with another for the purpose of breaking it, for, it seems, he really in such a case misrepresents knowingly the state of his own mind.

§ 116. **Does inadequacy of consideration justify rescission?** The language of many courts leads one to suppose that taking advantage of the needs of a person, who sells property for less than its value because he needs the money, is of itself "fraudulent." Such does not, however, appear to be the law. In Batty v. Lloyd (10) the defendant bought of plaintiff an interest in a reversionary estate dependent on the death of two old women, at a price much less than the actual value. The two old women died shortly afterwards, and plaintiff sought to be relieved from the sale. The court denied relief, saying: "Where

(9) 30 Gratt. (Va.) 454.
(10) 1 Vern. 141.

people are constrained to sell, they must not look to have the fullest price, as in some cases that I have known, where a young lady that has had £10,000 portion payable after the death of an old man or the like, and she in the meantime becomes marriageable, this portion has been sold for £6,000 present money, and thought a good bargain, too. It's the common case; pay me double interest during my life, and you shall have the principal after my decease." It must be admitted, however, that in another case Lord Chancellor Thurlow rendered a decision which it is hard to reconcile with Batty v. Lloyd. The case referred to is that of Gwynne v. Heaton (11) in which the chancellor relieved a man from a very unequal bargain which he had made because of his necessitous circumstances, there being an absolute failure to prove any fraud, duress, or any thing except the gross inequality of the purchase price as compared with the value of the thing sold. The plaintiff was a young man of twenty-three, who had married contrary to the wishes of his father and had in consequence been turned out. The thing sold was a reversionary annuity of £300 after the death of the father. Lord Thurlow, after stating that in order to set aside the conveyance "there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it," seemed to think that, even if in the case of ordinary transactions mere inequality would not be sufficient to justify rescission, "the heir of a family dealing for an expectancy

(11) 1 Brown Ch. 1.

shall be distinguished from ordinary cases, and an unconscionable bargain with him," would be set aside. It would seem that in America no such distinction is drawn in the cases.

§ 117. **Effect of concealment of material facts: Plaintiff under disability.** In some cases inadequacy of consideration appears to play a part, in connection with other elements, to bring about a decree for rescission. For example, in Summers v. Griffiths (12), Lord Romilly decreed a rescission upon the following facts: The plaintiff, an old woman of eighty-nine, in distress for money and having a doubt about the title to her property, came to the defendant and asked him to buy it at a fraction—about one-fourth or one-fifth—of its value. Defendant purchased at that price, knowing exactly what her title was, as she placed in his hands the will of her husband leaving the property to her. The following extract from Lord Romilly's opinion sums up his views upon the subject:

"Here is this man who knows everything about the title, and who admits (in the state of circumstances I have mentioned) that he allowed this old woman to sell the property to him for one-fourth its value, she believing there was a defect of title. If that be not fraud I am at a loss to know what the meaning of the word "fraud" is, in the proper and legal sense of the word. If a person comes to me and offers to sell to me a property which I know to be of five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot

(12) 35 Beav. 27.

make out a title, while I know that he can, and I conceal that knowledge from him, is not that a suppressio veri, which is one of the elements which constitute a fraud? . . . It is true, as Mr. Jessel says, that mere inadequacy of value is not a sufficient ground for setting aside a transaction. But how far is that to go? Is there to be no such inadequacy of value as can amount to evidence of fraud? Lord Thurlow said that to set aside a conveyance there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. Tried by this test, I am satisfied that most men of common sense would exclaim at the inequality, when they found that an old woman of eighty-nine had sold property for one-fourth of its value, because she was in distress, and that without any legal assistance, and without any person letting her know that she could make out a good title and obtain four or five times that amount."

§ 118. **Same: Parties on an equality.** It would seem that if the plaintiff had been, instead of an old woman, a business man of ordinary ability, no relief would have been granted. In other words, while the defendant in ordinary cases of this kind may maintain silence, he is under a duty to speak where the party he is dealing with is under the disability of age or infancy, or any other disability which unfits him to care for his own interests. In Harris v. Tyson (13) the defendant Tyson purchased at much less than its real value the right to dig and re-

(13) 24 Penn. St. 347.

move minerals from the plaintiff's land. Plaintiff alleged that he was induced to grant this right to the defendant by the latter's fraud and misrepresentation. It was shown that defendant knew the value of the minerals on plaintiff's land and that plaintiff did not, but, as the court said:

"A person who knows that there is a mine on the land of another may nevertheless buy it. The ignorance of the vendor is not of itself fraud on the part of the purchaser. A purchaser is not bound by our laws to make the man he buys from as wise as himself. The mere fact, therefore, that Tyson knew there was sand chrome on Harris' land, and that Harris himself was ignorant of it, even if that were exclusively established, would not be ground for impugning the validity of the deed. But it is not by any means clear that one party had much advantage over the other in this respect. They both knew very well that chrome could be got there, which one wanted and the other had no use for. But the whole extent of it in quantity was probably not known to either of them for some time after deed. When it was discovered that sand chrome was as valuable as the same mineral found in the rock, and that large quantities of the former could be got in certain parts of the fast land as well as by the streams, it was natural enough that the plaintiff should repent and the defendant rejoice over the contract; but this did not touch its validity. Every man must bear the loss of a bad bargain legally and honestly made."

§ 119. **Same: Conflicting decisions.** It must be admitted that it is hard to harmonize the decisions of the courts

upon the question when concealment, i. e., failure to disclose a material fact, amounts to such fraud as will lead to a rescission. Let us compare, for example, two cases. In the first (14) the plaintiffs were suing upon a note given them by the defendants. The defence was that the note was obtained by the fraud of the plaintiffs, who, through their agent, who sold for them a check to the defendants and received in exchange the note in question, failed to disclose facts which tended to show that the maker of the check was insolvent. It was obvious to all that this was a material fact and that the defendants would not have purchased the check had they known the concealed facts. This silence was held to amount to fraud sufficient to permit the rescission of the contract. In other words, according to this case, if I sell negotiable paper, I must not keep to myself material facts which tend to show that the maker is insolvent and the paper worthless. In the second case (15) it was held, in accordance with other and earlier decisions, that one who, knowing he is insolvent, buys goods on credit is not guilty of any fraud sufficient to justify a rescission, if he fails to disclose the fact of insolvency to the one with whom he is dealing. To these two we may add a third, viz., that if in the last case the buyer had not only concealed his insolvency, but had also had the preconceived idea of not paying for the goods, he would be guilty of fraud (16). The following passage from the second of the cases cited sums up the law: "The law is well settled in this state

(14) Brown v. Montgomery, 20 N. Y. 287.
(15) Hotchkin v. Third National Bank, 127 N. Y. 329.
(16) Durell v. Haley, 1 Paige, 492.

that mere omission of a purchaser of goods on credit to disclose his insolvency to the vendor, in the absence of any attempt to defraud, is not such a concealment as will avoid the sale, although the fact, if known to the seller, would affect his credit. The intent not to pay must exist when the property is purchased, and without proof of such an intent a judgment for the plaintiff cannot be sustained."

§ 120. **Same: Further illustration.** A situation which does not often arise and upon which therefore the authorities are not numerous was disclosed in Keen v. James (17). One Baldwin as cashier of a bank made and swore to false reports as to the condition of the bank. Baldwin became one of the executors of the estate of one James, and as such executor sold to the plaintiff shares of stock in the bank, the plaintiff being induced to make the purchase by the previous false statements made by Baldwin as cashier. The question for decision, therefore, was whether one who has in one character or capacity made false representations is bound when acting in another character or capacity to disclose the truth, so that silence will entitle the one dealing with him to rescind. The decision by the court was in favor of the plaintiff, and, it would seem, rightly so.

§ 121. **Effect of innocent misrepresentation.** It is perhaps unfortunate that the word "fraud" has by many judges and courts been used to cover cases where no intention to defraud, or culpably negligent misrepresentation of any kind, can be found, but the sole ground for

(17) 89 N. J. Eq. 627.

asking relief is that the plaintiff was induced to enter into the transaction because of misrepresentations made by the defendant in entire innocence and good faith. To call such transactions "fraudulent," to apply to them the epithet "legal fraud," as distinguished from "actual fraud," does injustice to the defendant and does not aid in solving the problem. For that reason it seems wise to deal with the effects of innocent misrepresentation separately, always remembering that courts are likely to speak of transactions involving it as cases of "legal fraud." The real problem then is this, stating it in concrete form: A has conveyed property to B; he was led to do this by certain statements of B which were in fact untrue, but B, when making them and until the transaction was completed, supposed them to be true. Will equity at A's request require B to join in a rescission of the transaction? It seems that it will, that, so far as recission in equity is concerned, the question is not so much what the intent of the defendant was, as what he did. Did the defendant misrepresent the facts? Was plaintiff induced to go into the transaction by the misrepresentation? Was his reliance upon it the act of an ordinarily reasonable man? If so, equity will decree a rescission. For example, in Torrance v. Bolton (18) the defendants advertised certain property for sale, and misdescribed it in the advertisement, which the plaintiff read. Plaintiff attended the auction, and the error in the description, which was a very material one, was corrected in a long statement of the conditions of sale which was read aloud

(18) L. R. 8 Ch. App. 118.

by the auctioneer's clerk, but plaintiff did not hear the same, as he naturally did not expect so important a matter to be left for statement in the mere conditions of the sale. The decision relieving the plaintiff from the contract was upheld by the court of appeal, not because of any fraudulent conduct on the part of the defendant, but simply because of the actual misrepresentation of the facts by the defendant, the plaintiff's reliance on the misrepresentation being the act of a reasonable man. A similar result was reached in Smith v. Bricker (19), in which recission was resisted on the ground that it was not shown that the misrepresentations, which were in fact made by the defendant and acted upon by the plaintiff, were made by the defendant in bad faith. The court held that defendant's knowledge or state of mind was immaterial.

§ 122. Plaintiff's action must be in reliance on defendant's representations. It is of course obvious that it is not material how much misrepresentation or concealment the defendant may have been guilty of, unless plaintiff was induced thereby to enter into the transactions whose rescission is sought. Whether the plaintiff did act because of the misrepresentations of the defendant is purely a question of fact in each case, to be ascertained from the evidence. A good illustration of this rule is to be found in the case of Smith v. L. & H. Corp. (20), in which the misrepresentation consisted in the statement that the hotel property which was being bought and sold was "now held by a very desirable tenant," the evidence showing

(19) 86 Iowa, 225.
(20) L. R. 28 Ch. Div. 7.

that he was just the opposite. A large part of the opinion of the court is devoted to a discussion, whether, admitting the misrepresentation, it "materially influenced" the ones seeking rescission "in coming to a conclusion to bid for the property." In the particular case the court found that the action was taken in reliance upon the representations of the other party. The opposite conclusion was reached in the case of Farnsworth v. Duffner (21), the court being satisfied from the evidence that the plaintiff had investigated the matter independently and placed no reliance upon the statements of the defendant.

§ 123. **Mere "puffing" not misrepresentation.** It seems clear that common sense and a knowledge of the usage of business demand that a purchaser of property he held to beware of relying upon statements which are statements of fact, but which every one must understand as merely the "puffing" which most persons seeking to sell property permit themselves to indulge in. Thus, the statement that a piece of property is worth a certain amount is a statement of fact, but a prospective purchaser may not rely upon it and obtain a rescission if it turns out later that the value is materially less. This rule is often stated to be that such a statement is a mere expression of opinion (22), but it would seem equally sound to say that to rely upon the statement in question is not the act of an ordinarily reasonable and prudent man, and so no rescission will be allowed. In the case just cited, however, the defendant went farther, and stated that some

(21) 142 U. S. 43.
(22) McKnight v. Thompson, 39 Neb. 752.

one else, whose opinion he thought would influence the plaintiff, had said the property was worth a certain sum. As this was a clear misrepresentation of a material fact, rescission was decreed. In another case (23) the statement by one seeking to sell a patent right that the patented article was "a new and valuable invention, and would save both steam and fuel" was held to be a statement of fact and not a mere expression of opinion.

§ 124. **Materiality of defendant's misrepresentations.** In an action at law for damages caused by the deceit of another, it is clear that the plaintiff must show that he has suffered actual damage from the defendant's misrepresentations. This does not seem to be true when rescission is asked in equity. In Potter v. Taggart (24) the defendant represented that a mortgage which he sold the plaintiff covered sixty-eight acres of land. It had originally done so, but by the joint action of mortgagor and mortgagee it covered only forty-six acres, although it still appeared on its face to cover sixty-eight. The defendant argued that no rescission could be had, unless the forty-six acres were actually insufficient to cover the mortgage debt. The court held that plaintiff was entitled to what he contracted for and not to something substantially different, and gave judgment for the plaintiff.

§ 125. **Necessity for restitution by plaintiff.** It is a fundamental principle governing this branch of equity that ordinarily the plaintiff who seeks to rescind must offer to restore to the defendant what he received from

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(23) Hicks v. Stevens, 14 Ill. 186.
(24) 59 Wis. 1.

the latter. This does not mean that he is to restore to the defendant something as valuable as that which he received, but the specific thing. If it has decreased in value, the defendant must nevertheless accept it and restore what he received from the plaintiff. An excellent illustration is found in Neblett v. Macfarland (25) in which the plaintiff induced by defendant's misrepresentations, had conveyed to the latter a plantation. The defendant, in consideration of this, surrendered to the plaintiff a bond signed and sealed by the plaintiff, i. e., he consented to the cancelation of his right to collect a sum of money from the plaintiff. The court decreed rescission and reconveyance, requiring the plaintiff to re-execute and redeliver to the defendant the bond in question, although it had become barred by the statute of limitations. Defendant objected, arguing that plaintiff ought to be compelled to pay the sum due, but the court held otherwise.

If a plaintiff, because of a change of position which has occurred before he discovered the fraud, is unable to make restitution of the thing received, the court will nevertheless decree restitution, making provision for the payment, out of the property restored to the defendant, of the value of what the plaintiff received (26). It should also be noted that there need be no offer by the plaintiff, before the suit is brought, to make restitution to the defendant, nor indeed is it necessary to make such an offer in the bill in equity itself (27). The reason is that the bill in equity is not based upon a rescission, but asks the

(25) 92 U. S. 101.
(26) Thackrah v. Haas, 119 U. S. 499.
(27) Jervis v. Berridge, L. R. 8 Ch. App.

court to bring a rescission about, and that the court, on final hearing and in the decree, will make provision for such restitution, as the price of relief to the plaintiff.

§ 126. **Effect of acquiescence or ratification.** It is obvious that, upon discovering that fraud or misrepresentation has been practiced upon him, a plaintiff must choose between one of two inconsistent courses. He may either seek to have the transaction rescinded, or, if he prefers, hold the other party to the agreement, as though no fraud or misrepresentation had existed. It is obvious also that he ought equitably to be required to make up his mind as to which he will do, within a reasonable time after he discovers the true situation, and this seems to be the law. For example, in Dennis v. Jones (28) the plaintiff had purchased a skating rink, the sale being brought about by defendant's misrepresentations. After he discovered the falseness of defendant's statements, plaintiff kept on with the business for months, making no attempt to bring about a rescission. It was held that this amounted to a ratification of the sale, and accordingly rescission was denied. Whether in a given case the plaintiff's conduct, after he discovers the fraud, amounts to a ratification or not is purely a question of fact, to be determined in each case upon its particular circumstances. It may be that plaintiff has found it advisable to take certain steps which are apparently a ratification of the transaction, but, on closer examination, they may appear to have been necessary in order to preserve the plaintiff's rights. If so, the

(28) 44 N. J. Eq. 513.

apparent ratification is not such in fact, and rescission may still be had (29).

Section 2. Duress and Undue Influence.

§ 127. Legal and equitable duress distinguished. The word duress received in courts of common law a much narrower construction than was given to it in equity. At common law, duress covered only certain actual or threatened interferences of a serious kind with one's person, and did not apply where action was taken to prevent threatened injury to property or to obtain possession of the same when illegally withheld. For example, if one made a contract because of "duress of goods," he could not avoid the contract upon that ground, and consequently, when sued for a breach of the same, had no defense for non-performance (30). Equity, however, felt that in many such cases the person who had made a contract or conveyed property, when under the influence of extreme terror or apprehension, not amounting to legal duress, ought to be relieved from the consequences of the action so taken, on the ground that it was not a voluntary act. We find accordingly that in many cases a plaintiff's only remedy is to file a bill in equity for rescission or cancelation, it not being possible to attack the validity of the transaction in a court of law. We must not omit to notice, however, that after the extension of the action of general assumpsit at law to cover quasi-contractual obligations, it became possible for a plaintiff to recover in

(29) Montgomery v. Pickering, 116 Mass. 227.
(30) Skeate v. Beale, 11 Ad. & El. 983.

a common law court money paid under either legal or equitable duress, since in this action the common law courts dealt with equitable as well as legal principles. See the article on Quasi-Contracts, §§ 28-29, in Volume I of this work. With this exception, the plaintiff, whose ground for complaint fell short of legal duress, was compelled to resort to equity for relief.

§ 128. **Duress of goods.** The general subject of duress of goods is dealt with fully in the article on Quasi-Contracts, §§ 28-29, already referred to, and need not be worked out in detail here. The usual form of duress of goods is the unlawful seizure or detention of them. The principle involved seems to be that a plaintiff need not wait for the slow process of the law to obtain possession of his goods, but may pay the illegal exaction and later recover the amount paid or property conveyed under such circumstances. The quasi-contractual action can be used only where the plaintiff parted with money because of the duress; if he conveyed property and seeks a reconveyance, he must of course call upon the court of equity. In other words, the duress does not prevent the title from passing to the defendant under the conveyance, but merely furnishes a ground upon which the court of equity will decree a rescission (31).

§ 129. **Duress to avoid injury to property or business.** It must be noted that ordinarily the mere threat to exercise a legal right does not constitute duress sufficient to justify a rescission (32). For example, in Hackley v.

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(31) Eberstein v. Willets, 134 Ill. 101.
(32) Dunham v. Griswold, 100 N. Y. 224.

Headley (33) the plaintiff was induced to accept $4000 in settlement of a claim for a much larger amount, because he needed the money immediately and had no other means of getting it. The defendant refused to pay more than $4000, claiming that that was all that was due, and told the plaintiff if he wanted more he could sue for it. Rescission was refused, as all that defendant had done was to threaten to exercise his legal rights to have the dispute settled by a judicial tribunal, and the mere added fact that plaintiff needed the money at once could not turn the defendant's action into duress. If, however, the defendant, although apparently doing nothing more than threatening to assert his legal rights, lays a trap for the plaintiff and succeeds in that way in taking advantage of the latter's necessity, a different case is presented. In Neilson v. McDonald (34) two of the defendants, having obtained a judgment against the plaintiff, waited until the latter was away from home before having execution issued, and placed the same in the hands of the deputy sheriff for immediate execution. The court found that the deputy sheriff was in conspiracy with the other defendants to take advantage of plaintiff's absence. The latter returned home the evening before the time set for the execution sale. The plaintiff on the morning of the sale asked for three hours delay in order to send four miles to get the necessary money, but this was refused. The sale was held and property worth $2000 sold for less than $300. This not being enough to satisfy the judg-

(33) 45 Mich. 569.
(34) 6 Johns. Ch. (N. Y.) 201.

ment, the deputy sheriff announced his intention to sell the household furniture to satisfy the residue of the execution. To prevent this, the plaintiff entered into the agreement whose rescission was asked. The relief asked for by the plaintiff was very properly granted, the legal process in this case having been abused. It is not possible, without a more detailed examination of the cases than our space permits, to indicate with any degree of exactness just where the line is drawn between the mere assertion of legal rights on the one side and such abuse of legal process on the other as will justify a rescission. Relief is granted in such cases only with great caution, the plaintiff being required to make out a very clear case before he can succeed.

§ 130. **Undue influence.** In certain cases, in which a relation of trust and confidence of some kind existed between plaintiff and defendant, equity stands ready to examine very carefully a conveyance of property by way of gift from the one who is under the influence of the other, to see whether advantage was not taken of the confidential relationship existing to obtain an undue advantage. Such relationships, for example, are those of parent and child, guardian and ward, attorney and client, trustee and beneficiary, and principal and agent. One or two examples must suffice. In Green v. Roworth (35) the two defendants were the sons of an old man of seventy-six, who was in a weak physical condition, very nervous, and easily subject to the influence of those surrounding him. They had taken advantage of their position to obtain from the

(35) 113 N. Y. 462.

father about all the property he possessed, paying practically nothing for it. On the facts as disclosed, the court held that undue influence had been exerted and decreed a reconveyance of the property. A case in which undue influence of a parent over a child was alleged but found not to exist is that of Knox v. Singmaster (36).

§ 131. **Same: Presumption of.** Wherever one of these confidential relationships exists, the court of equity indulges in a presumption that undue influence was used, and, when the validity of a gift or sale is attacked, requires the one, who, being in the position of influence over the other, has apparently benefited by it, to show affirmatively that such was not the case. An excellent application of this rule, which throws the burden of disproving undue influence upon the one who has apparently taken advantage by his influence, is found in the case of Dunn v. Dunn (37), in which the court on examining the evidence found that the attorney in question had failed to establish that undue influence was not used, and so decreed a rescission. Indeed, it is held in England that there is a hard and fast rule that, in such cases as the one last cited, the gift is invalid unless it appears that the client had the advice of a competent and disinterested attorney (38), even though the evidence shows in fact no undue influence. This is based upon public policy, it being thought better to have a hard and fast rule rather than to inquire into the facts of each case.

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(36) 75 Iowa, 64.
(37) 42 N. J. Eq. 431.
(38) Liles v. Terry, L. R. 2 Q. B. 679.

Section 3. Illegality.

§ 132. Distinction between executory and executed transactions. At the outset of our discussion, we must notice the distinction which exists between the plea of illegality as a defence to an action brought in equity for the specific performance of an executory agreement, and an equitable suit seeking to bring about the rescission of an executed transaction. Illegality as a defence to a suit for specific performance has been sufficiently dealt with earlier in this article (§ 71a). By comparing what follows with that discussion, it will be seen that there are many cases in which specific performance would be denied, because of the illegality of the agreement; and yet, if the agreement had been carried out, equity would refuse to aid a plaintiff seeking to undo what had been done. The reason for this is the doctrine that equity is not willing to help a plaintiff, who comes into court and has to admit that he is equally guilty with the defendant of engaging in an illegal transaction. For example, it is clear that specific performance of an agreement to convey property would be denied if the consideration was the plaintiff's becoming defendant's mistress; but, if the agreement had been carried out by the conveyance of the property, a reconveyance would not be ordered.

§ 133. Application of principle. In accordance with this principle, the court in Batty v. Chester (39) refused to order the cancelation of a deed executed for just such a consideration, although the one who obtained the deed

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(39) 5 Beav. 103.

in this way had broken her part of the illegal agreement. In Sismey v. Eley (40), however, it was held that a rescission could be had if the conveyance was made purely in consideration of the defendant's promise to live with the plaintiff as his mistress in the future, and such illicit co-habitation was never in fact carried out, the plaintiff abandoning the illegal purpose before it was executed in whole or in part. In the case of Benyon v. Nettlefold (41) the distinction is well expressed by Vice-Chancellor Shadwell as follows: "In Sismey v. Eley, it appeared that, although there was originally an immoral purpose, yet the party who filed the bill to be relieved from the deed which he had executed had abandoned that immoral purpose; and the act, in contemplation of which the deed was executed, had never been done. In that case, therefore, when the party filed his bill to have relief, he was in the situation of a person who had intended to do something immoral and, to a certain extent, illegal, but had refrained from doing it, and who, before he committed the crime, changed his mind and asked to be relieved."

§ 134. **Comparison with law of quasi-contracts.** In the article on Quasi-Contracts, §§ 26-27, 51, 55, in Volume I of this work, will be found a discussion of the recovery of money paid under an illegal agreement. As pointed out there, the remedy in quasi-contract is based upon equitable principles, and much that is said there can be applied here. It follows, from the distinction there pointed out, that transactions which are malum in se (i. e., involve

(40) 17 Simons, 1.
(41) 17 Simons, 51.

moral turpitude) or involve violations of the criminal law, must be distinguished from those in which the illegal act is merely malum prohibitum (i. e., forbidden, but not immoral or criminal). To the latter class of cases the principle which forbids relief to a plaintiff seeking rescission does not apply. Equally applicable here also is the other principle there set forth, viz., that where the transaction is criminal, but the law violated is one passed for the protection of the class to which the plaintiff belongs, rescission may be had, as the plaintiff is not regarded as equally guilty with the defendants. The usual example of this class of cases is the law against the exaction of a usurious rate of interest, obviously intended to protect the debtor from the money-lender. For further details, the reader is referred to the passages referred to in the article on Quasi-Contracts, § 27.

§ 135. Ultra vires contracts of corporations. The subject of contracts of corporations that are illegal in the sense of being ultra vires (beyond the corporate authority) is treated in the article on Private Corporations, §§ 144-48, in Volume VIII of this work, including the remedy of rescission when available.

CHAPTER VIII.

INJUNCTIONS AGAINST TORTS.

Section 1. Waste.

§ 136. Injunction against legal waste. It sometimes happens, perhaps more often in England than in this country, that real property is left to one or more persons for life, with remainders over to other persons; for example, to A for his life, remainder to B and his heirs. A is, by the terms of the grant, entitled to the use and occupation of the property during his lifetime, and B has what lawyers call only a right in remainder, a present right of future enjoyment. See Title to Real Estate, § 31, in Volume V. Suppose now that A, being in possession, is destroying the property or a portion of the same. It being clear from the terms of the grant that the giver intended B and his heirs to use the premises, at the expiration of A's life interest, it is obvious that A is committing a legal injury to B, called *waste*. Clearly, also, to give B only an action for damages, as the common law does in such a case, is not an adequate remedy. We should therefore expect equity to interfere at B's request and stop by injunction the threatened destruction of the premises, and this is what it does. One of the earliest examples is that of Whitfield v. Bewit (1) in which an in-

(1) 2 P. Williams, 240.

junction was granted to prevent the tenant for life in possession from opening mines on the premises and taking out ore. Cases involving this same question may of course arise in the case of the ordinary tenant for years. The tenant in possession, with the right to use the premises without substantially altering their character, may be undertaking to deal with them as if he really owned them. In a case of this kind, the landlord has a right to an injunction to stay the waste. In Brock v. Dole (2) the tenant was in possession of a storeroom in a one-story frame building which was owned by the plaintiff. The defendant had commenced to erect a chimney on the inside of the room, cutting a hole through the ceiling, and was about to cut a hole through the roof, when the injunction was obtained restraining him from proceeding farther. The injunction was sustained on appeal, the only question being whether the erection of a chimney under the circumstances was waste. The court held it was, saying that "a tenant cannot, without the consent of the landlord, make material changes or alterations in the building to suit his taste or convenience, and if he does, it is waste."

§ 137. **Ameliorating waste.** We must not hastily conclude that in all cases where the act of the defendant is really legal waste, the court of equity will interfere by injunction. Here, as elsewhere in equity, if the relief by way of injunction would benefit the plaintiff little, if any, and if, on the other hand, it would inflict upon the defendant great pecuniary loss, the court may, in the ex-

(2) 66 Wis. 142.

ercise of the discretion vested in it, refuse to grant the extraordinary relief asked for, and leave the plaintiff to recover whatever damages a jury would give him at law. In the leading case of Doherty v. Allman (3) the tenant held the property in question on two leases for 999 and 988 years respectively, each of which had still more than 900 years to run. The reversion was vested in the plaintiff. The building originally consisted of stores for the storing of grain, but the character of the neigborhood had changed so that the defendant had difficulty in obtaining tenants who would use the property as storehouses. The defendant therefore had had plans made to alter the buildings into dwelling houses. The owner of the reversion sought to enjoin him from doing this. The injunction was refused, on the ground that, though this might be technical waste from the legal point of view, the result would be beneficial rather than harmful from a financial point of view to the plaintiff, the holder of the reversion, and on the other hand great pecuniary loss to the defendant would ensue if he were not allowed to make what was really, under the circumstances, a reasonable use of the premises. Waste of this kind is often called *ameliorating waste,* that is, a proceeding which results in benefit and not in injury. In the course of his opinion in this case, Lord O'Hagan said: "When in a case of this sort we are asked to exercise our discretionary jurisdiction, it surely is material to see that the interest of the individual, who is only to come into possession of the premises at the end of nine hundred years, is in-

(3) L. R. 3 Appeal Cases, 709.

finitestimally small compared with the interest of the man who is the tenant and who, with his successors, is to use the premises all that time, upon whom the effect of our exercise of this jurisdiction would be to tie up his hands and destroy the property and to inflict great damage upon them during the course of these many centuries that are yet to come.''

It must, however, be noted that it is the length of the term which has the important effect in the case cited. It seems clear that a tenant for a brief period would not be allowed substantially to alter the buildings on the premises, even though the result would be to improve the premises from the point of view of other persons. In such a case it seems that the landlord has a right to have the character of the premises left unchanged.

§ 138. **Permissive waste.** Without going into the nature or extent to which a tenant in possession, who suffers the property materially to deteriorate, is liable to the holder of the reversion in an action for damages at law, on the ground that he is guilty of what is called *permissive waste,* it is sufficient for our purposes here to point out that equity has always refused to restrain the commission of permissive waste, for that is really to compel the defendant to expend money in repairing the premises; that is, compel him to do an affirmative act and not merely to refrain from acting, as in the case of active waste (4).

§ 139. **Accounting for past waste as incidental to injunction.** In all cases in which the court grants the injunction to stay active waste, the plaintiff, if he be the owner

(4) Cannon v. Barry, 59 Miss. 289.

of the remainder or reversion in fee, is entitled, if he asks for it, to a decree for an accounting of the injury already committed; upon the principle, to which reference has already so many times been made, that where a court of equity takes jurisdiction of a controversy on equitable grounds, it proceeds to administer complete relief and settle the whole controversy, even to the extent of administering legal as well as equitable relief, if that be necessary. The effect is that if the defendant, before the equitable proceeding is brought, has finished committing the acts in question and is not threatening to commit any further acts of waste, there are no grounds for securing relief in equity, and the only relief obtainable is by an action at law for damage. If, however, the defendants were only partially finished and were threatening to continue, an injunction may be obtained as we have seen, and, as incidental to that injunction, equity proceeds to order an accounting of waste already committed, and a payment of the sum thus found due.

§ 140. **Same: Rights of successive tenants in proceeds.** A question sometimes arises as to the disposition of the fund thus obtained. For example, suppose the estate had been left to A for life, remainder to B for life, remainder to C and his heirs. A, the tenant for life, had committed waste by cutting timber, and was threatening to commit further waste. An injunction was obtained, and, in connection therewith, an accounting had, the sum found due being paid into court. Has B, the second life tenant, any interest in this fund, or does it belong solely to C? To settle this problem the court of equity, in view of the fact

that it is interfering simply for the protection of a legal property right, asks the question, to whom would the articles severed by the life tenant belong at law? The answer of the common law is, to the holder of the first estate of inheritance, that is, to C, as distinct from the owners of intervening estates for years or for life. The fund in question is, of course, simply the proceeds of the severed articles, and therefore, since, in giving the accounting the court of equity is merely administering the relief which otherwise would have been obtained in a court of law, it follows that the fund should go to the holder of the first estate of inheritance. As we shall see in a moment, a different result is reached by equity in dealing with what is called "equitable waste," which will be discussed below.

§ 141. Tenancies without impeachment of waste. Equitable waste. An estate may be left in one of the ways we have just mentioned, with the following modification, that in the gift to the life tenant it is stated that his estate shall be "without impeachment of waste." This phrase means that the testator wishes to allow the life tenant to commit acts which, without this provision, would be waste as against the remaindermen. Courts of common law give to these words a very literal interpretation and hold that a life tenant may do about as he pleases, permitting him to cut down all the trees, including ornamental and shade trees, tear down the house, and exercise, in other words, substantially all physical rights of ownership. Equity, however, early took the view that such was not the intention of the testator; that, while he

wished to allow the life tenant a large amount of freedom in dealing with the property, he certainly also wished that the remainderman and his heirs should have something more than an empty piece of land. Equity, therefore, began to grant injunctions to restrain the tenant in possession from doing things which the court of common law said he had a perfect legal right to do. This situation gave rise to the doctrine of *equitable waste,* by which is meant the doing of acts, which, while not wrongs in a court of common law, are considered wrongs by equity, and which will be enjoined if the action be brought in time.

§ 142. **Same: Test of equitable waste.** The doctrine of a court of equity upon this point is well stated in the case of Micklethwaite v. Micklethwaite (5) by Lord Justice Turner: "This doctrine of equitable waste . . . is an encroachment upon a legal right. At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not permit an unconscientious use to be made of a legal power. . . . If a devisor or settlor occupied a mansion house with trees planted or left standing for ornament around and about it, . . . in devising or settling it so as to go in a course of succession he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion house, and it cannot be presumed that he wants it to be denuded of those ornaments

(5) 1 DeG. & J. 504.

which he has himself enjoyed. This court, therefore, in such a case, protects the trees against the acts of the tenant for life." The test, as often stated, is that the tenant without impeachment for waste will not be permitted by equity to do things which a prudent man would not do in the management of his property, such as removing or destroying the buildings, cutting bushes and shrubs planted for shade or ornament, or carrying away the soil. He may, however, for example, cut timber and sell it, that is, the marketable timber; but must not go beyond the limits of good husbandry. Under this rule, he would, it seems be prevented from cutting trees below a certain size, or to such an extent that the future growth of timber would be prevented.

§ 143. Accounting for equitable waste. In the case of equitable waste, then, the rights of the remaindermen are wholly equitable, and for this reason it follows that even though the tenant has completed all the things he proposes to do, equity will take jurisdiction of the case and award compensation to the injured remaindermen. This is necessary, of course, because no action for damages at law will lie on their behalf. Another difference between legal and equitable waste appears in the manner in which equity distributes the proceeds of waste already committed. In legal waste, as we have seen, the proceeds go to the owner of the first estate of inheritance. In a court of equity, this is not true in the case of equitable waste. The view which equity takes is this: At law the tenant for life had a right to cut these ornamental trees. In equity, however, this is regarded as a wrong to the re-

maindermen, whether their interests be for life or in fee simple, because it was the intention of the testator that they should enjoy the estate with these ornamental trees upon the premises. Had they not been cut, a remainderman for life or years who came into possession of the property would have enjoyed them. It is, therefore, only fair that as they have been cut and sold, they who would have enjoyed the use of them for a certain period should have the income of the fund for a similar period, leaving the principal sum to be paid over to the owner of the estate of inheritance when he comes into possession. The distribution of the fund in equity is made in accordance with this principle.

§ 144. **Mandatory injunctions after active waste.** Although, as we have seen, equity refuses to interfere to prevent permissive waste, in a few cases equity has ordered that the premises be repaired at the expense of the defendant, who had committed active waste by tearing down portions of the premises (6). This has been done where the rights of intermediate tenants of the estate could not be otherwise adequately protected.

§ 145. **Injunction against waste by mortgagor in possession.** A question somewhat analogous to that of which we have just been treating arises in the case of the mortgage of land given as security for a debt. Usually the mortgagor is left in possession of the premises. In some jurisdictions, in the case of the mortgage, the legal title to the premises is regarded as being vested in the mortgagee. In other jurisdictions it is considered to be in the

(6) Vane v. Lord Barnard, 2 Vernon, 738.

mortgagor. See Mortgages in Volume V of this work. For our purpose, however, the determination of this question is immaterial. All agree that the mortgagee is entitled to relief in equity, by way of injunction, to prevent a mortgagor in possession from committing waste to such an extent that the premises will cease to be sufficient security for the debt. One of the leading American cases on this subject is Brady v. Waldron (7) in which Chancellor Kent put the matter very shortly: "The court will not suffer him [the mortgagor in possession] to prejudice the security." The limits upon the doctrine should be carefully noted. The mortgagee is not entitled to the injunction, unless the result of the mortgagor's acts is substantially to impair the value of the security. This doctrine is not limited to cases in which the relation is, in the strict sense of the word, mortgagor and mortgagee. It applies, for example, as previously pointed out in the chapter on specific performance (§ 30, above), to a buyer in possession who has not paid the purchase price, in those states in which the seller is given a lien for the purchase price.

§ 146. Waste between tenants in common. The doctrine under consideration has also been extended to cover cases of tenants in common, where one is in possession of the property and is committing or threatening to commit acts which would materially injure or destroy the estate or some portion of it, acts, therefore, which are "destructive of the estate and not within the usual and legitimate powers of enjoyment" (8).

(7) 2 Johns. Ch. 148.

(8) Hawley v. Clowes, 2 Johns. Ch. 122.

Section 2. Trespass.

§ 147. Nature of trespass at common law. The common law conception of trespass to real estate is confined strictly to cases in which the act of the alleged trespasser is a direct interference with another's possession of land. According to this view, a person in possession of land can under no circumstances be guilty of a trespass, even though the title to the land and the right to the possession of the same be vested in another (9). The real owner of the land must first bring his action to recover possession of the land, and then, by a fiction, his possession is held to relate back to the time when he became entitled to the possession. The acts done by the wrongdoer in possession become trespasses by relation, and the damages done by such wrongdoer are recoverable in an action of "trespass for mesne profits" (See note 19, below). So also, a landlord whose land is in the possession of a tenant (other than a tenant at will) cannot sue in trespass for an injury done to his land. Injury by a tenant is waste, and injury by a third party is not a trespass, although, if permanent damage to the land results, the landlord, the owner of the reversion, may bring an action on the case in which he recovers the actual damage inflicted upon him. It should also be noted that the tenant in possession in a case of this kind is at common law entitled to bring an action of

(9) One exception to this statement must be noted, an exception, however, which seems to be arbitrary and not based on principle. In the case of a tenant at will, if the tenant is committing acts of waste upon the premises, the landlord may, if he chooses, treat the possession of the tenant as having been terminated because of the wrongful acts, and bring an action of trespass.

trespass against a third party interfering with his possession.

§ 148. **Equitable conception of trespass.** In equity, however, all the injuries to the land above referred to, whether committed by one in or out of possession, are discussed under the head of trespass, unless the one in possession be a tenant, in which case they are called waste. In this discussion, we shall of course use the term trespass in the broader sense, as understood by equity lawyers.

§ 149. **Injunction against non-destructive trespass where title not in dispute: Repeated acts.** Suppose A is in possession of a piece of land, and that B, claiming no title or interest in the same, is committing acts of trespass. The acts may cause no appreciable injury to the land, or they may cause a permanent injury to it. In the first case, it is clear that no equitable remedy is needed, if the acts are not continuous in their nature and there is no threat of their being repeated. If, however, the acts, although inflicting no permanent damage, are continuous in their nature, or are repeated from day to day, the remedy at law for damages becomes inadequate, as it necessitates the continual bringing of new actions for the trespasses as they are committed. It is clear, therefore, that there are many cases in which equity ought to interfere by injunction to prevent the repetition of acts which inflict no permanent damage upon the land, in order to prevent a multiplicity of suits which would otherwise arise. For a long time apparently, equity refused to interfere with trespass at all, and only gradually extended

its jurisdiction to cover it. It seems, however, to be clearly settled today that an injunction will be issued in appropriate cases, where otherwise multiplicity of suits would arise. For example, in Goodson v. Richardson (10) the plaintiff was the owner of land abutting upon a highway, and as such was owner of the adjoining one-half of the highway, subject of course to the rights of the public to use the land for highway purposes. The defendant owned some houses in the neighborhood, and proceeded to construct waterworks for the supply of the houses. He applied to the highway board for permission to lay pipes along the highway, which was granted him, the board informing him, however, at the same time, that they could only give him permission subject to the rights of the owners of the lands. The defendant, without obtaining permission of the plaintiff, laid pipes in the soil along the side of the road adjoining the land of which the plaintiff was owner. The plaintiff applied for a perpetual injunction to restrain the defendant from laying any more pipes, and from allowing those already laid there to remain. The injunction was granted.

§ 150. **Same: Temporary or trifling trespasses.** Where, however, the trespass will do no particular injury to the land, and there is no threat of constant repetition, that is, where it is only temporary, no injunction will be granted even though the title of the plaintiff is not disputed, for the obvious reason that the remedy at law in damages is adequate (11). It should also be noted that

(10) L. R. 9 Ch. App. 221.

(11) Gates v. Johnstone Lumber Co., 172 Mass. 495.

in a few cases, in which the title of the plaintiff was not disputed by the defendant, the court refused an injunction where the trespass of the defendant was continuous in its nature, on the ground that the pecuniary loss to the plaintiff was so small that equity would not interfere (12).

§ 151. Same: Trial of title at law. In cases of this kind, where the only ground for the injunction is the multiplicity of suits, can the defendant insist that the plaintiff first assert his title at law in an action of trespass, before seeking relief in equity, on the ground that it is not the function of a court of equity to try title to real estate? We must recall that we are at present dealing only with cases in which the defendant does not assert title in himself, and in which the plaintiff is in possession. Clearly, in such a case, there need be no trial at law before the granting of the injunction, as the title of the plaintiff and the wrongfulness of the act of the defendant are clear. The more common case is the one in which the defendant asserts title in himself or claims a right to do the act in question, and this will be discussed a little further on (§§ 155-59).

§ 152. Destructive trespass where title not in dispute. Let us now consider the case in which the act of the defendant, admittedly a trespass, amounts to a permanent destruction of a portion of the property itself. Clearly here also the court of equity ought to interfere by injunction, at least in many cases, and it does so. We should at the outset notice the distinction between this situation and that just discussed. In the case where the act does

(12) Fisher v. Carpenter, 67 N. H. 569.

not result in any material injury to the property, and the injunction is granted to prevent a multiplicity of suits, the injury of which the plaintiff complains consists in an interference by the wrongdoer with the possession of the plaintiff. Here, however, where the act results in a permanent destruction of the property itself, the protection the court is called upon to give is primarily to the property right of the plaintiff to have land which belongs to him preserved from destruction, and not merely to his right to remain peaceably in possession. Perhaps the earliest case in which the court of equity interfered to prevent the destruction of the property itself is that of Mitchell v. Dors (13) decided by Lord Eldon in 1801. In that case an injunction was granted to restrain the defendant, owner of an adjoining coal mine, from working into the plaintiff's mine and taking out coal from it.

§ 153. Same: What damage is irreparable. While the cases on the subject are not entirely in accord, the prevailing view seems to be that any act which destroys any considerable amount of the substance of the property is to be regarded in and of itself as irreparable damage, entitling the owner to an injunction. For example, in the case of Richards v. Dower (14) the trial court found that, at the time of the commencement of the action, the defendants had excavated and driven a tunnel under the lot of the plaintiff a distance of fifteen feet, and were engaged in a further extension thereof and threatened to continue the same, but also found that the tunnel had not

(13) 6 Vesey, 147.
(14) 64 Cal. 62.

affected, and would not, if completed, affect injuriously or otherwise the surface ground of the plaintiff's land. There was also a further finding of the trial court to the effect that "the driving of the tunnel was not causing and will not, if completed, cause the plaintiff irreparable injury, or injure said lot in any way." The trial court therefore dissolved the temporary injunction which had previously been granted. On appeal the decision of the trial court was reversed, on the ground that the finding that the injury was not irreparable was inconsistent with the findings which described the character of the work which it was sought to have enjoined. In some cases, however, where the act of trespass which the defendants were threatening to commit would result in taking only a small amount of the substance of the property, and there was no threat of a repetition of the act, an injunction was refused on the ground that, in view of the smallness of the injury, the remedy at law for damages would be adequate (15).

§ 154. Defendant in possession without claim of right. In a few cases courts of equity have granted injunctions against defendants, who, as they knew, were wrongfully in possession of the plaintiff's land, and were excluding the plaintiff from the same. For example, in Webster v. Cooke (16) the defendant had excluded the plaintiff from pasturing his sheep on the land in question, and an injunction was granted restraining the defendant from continuing to do so. It would seem, however, that unless the defendant is in some way permanently injuring the

(15) Thornton v. Roll, 118 Ill. 350.
(16) 23 Kan. 451.

premises, so that an injunction is necessary to preserve the premises from destruction, the plaintiff has an adequate remedy at law in the shape of an action of ejectment, or similar action, to recover possession of the premises from which he has been excluded by the defendant. To grant any relief, beyond a temporary injunction to prevent permanent injury to the premises, seems to result in substituting a bill in equity for an action at law to recover possession of the premises.

§ 155. **Plaintiff in possession under disputed title.** Let us now consider the case in which both plaintiff and defendant claim the title to the property. We must distinguish between the cases in which the defendant is in possession and those in which the plaintiff is in possession. For convenience we shall consider the latter first, that is, the case of acts committed by B, the defendant out of possession, and an injunction being sought by A, who is in possession, both parties claiming title to the premises. It was only with great reluctance that jurisdiction in equity was extended to cover cases of this kind at all. It was for a long time supposed that, if the defendant in the injunction proceedings claimed title for himself, the bill must be dismissed. That an injunction will be issued in such cases, however, seems now to be well settled, provided certain conditions are complied with. The difficulty with the situation is, that, if the title turns out to be really in B, the acts which B is doing are not trespasses. That is to say, if sued by A for the alleged trespasses, B may, if he be the owner, defeat the action by asserting and proving title in himself. In other words,

it is not a trespass for B to commit acts on land which really belongs to him, although the same is wrongfully in the possession of A. This being so, when A applies for the injunction, both parties claiming title, the court of equity is confronted by the proposition that it is not the function of the court of equity to try the title to real estate.

§ 156. **Same: Trial of title at law.** The first proposition, therefore, to be settled, is whether equity will refuse any relief until the court of law has settled the title. Clearly, where the dispute as to the title depends upon a question of fact, which at law would be passed upon by a jury, no permanent injunction will be granted until the title is settled in a suit at law, providing, of course, that the defendant in the injunction suit raises the question of title. On the other hand, if the dispute as to the title turns merely on a question of law, which in a suit at law would be decided by the court, the chancellor feels that he is equally competent to determine this question of law, and in such case, therefore, equity will settle the title without any trial at law, according to the weight of authority (17). In a few states, by statute, it is provided that the court of equity shall determine the whole case, even though the title of the plaintiff is in dispute and the determination of the discussion involves a question of fact. In a few states, also, a court of equity, without the aid of a statute, has adopted the same principle, on the theory of avoiding the necessity of sending the plaintiff to two courts to obtain his rights (18). These rules as

(17) Belknap v. Belknap, 2 Johns. Ch. (N. Y.) 463.
(18) Ladd v. Osborne, 79 Iowa, 93.

to the necessity of a previous trial at law seem to apply whichever party is in possession.

§ 157. **Same: Temporary injunction.** Assuming then that no permanent injunction will be granted until the title is settled in the manner stated above, to what relief is the plaintiff in possession entitled where the title is in dispute? Clearly, in many cases where the act of the defendant is permanently injuring the property itself, it would not do for a court of equity to permit the acts of the defendant to continue during the time necessary for the settlement of the disputed title, for the result might be that at the end of that time it would be determined that plaintiff was really the owner of the property, and in the mean time the defendant would have succeeded in destroying or making away with a considerable portion of the plaintiff's property. Accordingly, in cases of that kind, a temporary injunction is granted, which will be made permanent or dissolved according to the outcome of the suit for the determination of the title.

§ 158. **Defendant in possession under disputed title.** The cases where the defendant is in possession of the property present greater difficulties, where the title is disputed. Both parties claim to own the land. The party out of possession wishes to prevent the party in possession from destroying the property, pending the result of a trial at law for the recovery of the possession of the property. As we have seen above, the technical difficulties in the way are that, since the defendant is in possession, his acts are not trespasses. In fact, they are not torts at all, so far as the court of law is concerned, even

though the title be really in the plaintiff. As already noticed (§ 147, above), at common law the remedy of the plaintiff is to bring an action for the recovery of the property, and it is not until he has succeeded in that action that he can recover in any form of action for the acts of the defendant injuring the land. As we have already seen, the plaintiff is then entitled to bring an action known as trespass for mesne profits, in which he recovers damages for A's acts, which, while not technically torts at the time they were committed, became such by virtue of the doctrine of relation (19).

§ 159. **Same: Temporary injunction.** Although the acts of the defendant in possession are not technically trespasses, nevertheless, if the real ownership of the property is in the plaintiff, it is obvious that the defendant ought not to be allowed to destroy the property, pending the determination of the dispute as to the ownership, and it is therefore held in a majority of the cases that a temporary decree will be granted, preventing the one in possession from actually destroying the property, until the question of the title and the right of the plaintiff thereto can be settled (20). On the other hand, pending the action for possession, while the title is disputed and still undetermined, equity will not interfere to restrain the defendant from continuing to use the premises in the ordinary and natural way and enjoying all the ordinary bene-

(19) Usually, under modern statutes, the plaintiff in a situation of this kind is permitted today to bring one suit for the recovery of the possession and any damages which he would have recovered under the old action of trespass for mesne profits.

(20) Erhardt v. Boaro, 113 U. S. 527.

fits which flow from possession. As the court said in one case: "If the premises be a farm, the defendant would not be restrained from cultivating the land and enjoying all the benefits which flow from the natural and ordinary use of a farm as a farm. To this end he should be permitted to sow and gather any ordinary crops from the cultivated ground. He should be permitted to use all the usual agricultural implements, not merely for harvesting crops, but also for planting and cultivation. . . . In short he should be permitted to use the farm in any ordinary way as such a farm is used, with the reasonable limitation that he . . . make no substantial and injurious change in its condition" (21).

§ 160. **Trespass on land in street owned by plaintiff.** Where land is dedicated to the use of the public as a street or highway, usually, according to the principles of common law, the ownership of the street or highway is still vested in the owner of the abutting property, subject to the rights of the public to use it for street or highway purposes. The question then arises, what are street or highway purposes, and upon this question courts have differed. If it be found that a given act is not fairly included in the grant to the public, the doing of the act is regarded as a trespass against the owner of the land, and may, in a suitable case, be enjoined. For example, in the case of Williams v. New York Central Railroad Company (22) an injunction was granted restraining the defendants from continuing to use and occupy with their railway

(21) Snyder v. Hopkins, 31 Kan. 557.
(22) 16 N. Y. 97.

a portion of the street in the village of Syracuse, the plaintiff being the owner of a number of lots fronting upon the street. Of course it was essential in reaching the decision which the court did, to determine that running a steam railway through the street was not within the scope of rights for street purposes granted to the public. In connection with such cases, however, it should be noted that if the defendant has the right to take the plaintiff's land by eminent domain, he will not be enjoined from continuing to operate a railroad already built, if he will agree to take at once all the required steps of a proceeding to condemn the land in question. In some states also, the relief granted in equity is so framed as to avoid the necessity for a separate condemnation proceeding, the injunction being refused if the defendant undertakes to pay promptly the damage to the plaintiff's land, its value being ascertained in the injunction suit itself (23).

§ 161. **Mandatory injunction to prevent continuing trespass.** Although in the early cases dealing with injunctions the chancellor was reluctant to order a defendant to do something, as distinguished from refraining from doing an act, nevertheless relief was granted in suitable cases. In connection with trespasses it is clear that where a defendant has, without right and without excuse, erected structures on the plaintiff's land, he will be compelled by equity so far as possible to undo what he has wrongfully done, and to pay the damages caused. For example, if a defendant should wrongfully and wilfully build a house

(23) Henderson v. New York Cent. Ry. Co., 78 N. Y. 423.

over upon his neighbor's land, it seems that equity would compel him to remove it.

§ 162. Same: Innocent trespasses doing little injury. On the other hand, where, by an innocent mistake, erections are placed a little upon the plaintiff's land, and the damage which would be inflicted upon the defendant by compelling him to remove them would be greatly disproportionate to the injury of which the plaintiff complains, a court of equity would refuse to order their removal, but would leave the plaintiff to obtain what remedy he could at law. In Hunter v. Carroll (24) the defendant had by mistake erected two houses which extended over the line upon the plaintiff's premises a few feet. It appeared that the strip of land, sufficiently wide to include that part of the plaintiff's land upon which the defendant's buildings stood, was worth $10. The location of the line between the two pieces of property had been established in a previous suit at law, before the bill in equity was filed. The plaintiff now asked that the defendant be ordered to remove the two houses from the plaintiff's premises. The court entered a decree that if the plaintiff executed a quit-claim deed or release to the defendant of the strip of land ten feet in width to include the land upon which the house of the defendant stood, judgment should be entered for the plaintiff for the value of the land so conveyed; otherwise the bill to be dismissed with costs.

Section 3. Nuisance.

§ 163. Meaning of "nuisance." The term "nuisance" is used rather loosely to include classes of wrongs which

(24) 64 N. H. 572.

are really, according to a scientific classification, separate and distinct things. In the first place, nuisances are designated as being either public or private nuisances, accordingly as they infringe public or private rights. The distinction can be best illustrated by a concrete example. Keeping a public gambling house or a disorderly house, or obstructing a highway, are examples of public nuisances. Allowing one's trees to overhang his neighbor's land, or permitting without lawful excuse the escaping onto another's land of such relatively immaterial things as offensive odors, disease germs, smoke, etc., are examples of private nuisances. The term nuisance is also used to include a wrongful disturbance of easements or other servitudes, but for convenience that subject is best dealt with as a separate problem. In what follows we shall first deal with private nuisances as a separate class, and then with public nuisances, as they require separate treatment (25).

§ 164. Necessity for previous trial at law. It is obvious that in most cases the remedy at law in damages would be entirely inadequate relief to grant the landowner, who is the victim of a nuisance emanating from his neighbor's land, and accordingly equity exercises a jurisdiction by injunction to prevent a continuance of the offense. The first question to be settled is this: Since the question whether a nuisance exists or not is primarily a question of common law, as distinguished from equity, must a plaintiff, before resorting to equity for an injunction, es-

(25) For a more extended discussion of what constitutes a nuisance see the article on Torts in Volume II of this work.

tablish by a suit at law that the thing sought to be enjoined is a nuisance? In the early history of the dealings of equity with this and kindred subjects, it apparently was the rule that the plaintiff must first establish his rights at law, but the old rule has generally been abandoned, both in England and in this country. In Turner v. Mirfield (26) the question was discussed and settled by Sir John Romilly in the following language: "It is said on behalf of the defendant that the utmost that this court can now do is to direct an issue [that is, have the matter determined by a jury] . . . to see whether there is a nuisance. . . . I dissent from that argument, for I am of opinion that it is not necessary to adopt that course, except when there is some doubt in the mind of the court as to the fact; but here I am satisfied that there is a nuisance and that the plaintiff is entitled to have it stopped." The same rule, as already stated, appears to have been universally adopted in the American courts. The limits of the rule, however, must be carefully noted. If it be clear that a thing is a nuisance, equity will, without a prior action at law, grant a permanent injunction restraining its continuance. If, however, the right of the plaintiff or the wrong of the defendant is doubtful, the court of equity in nearly all the states refuses a permanent injunction until the plaintiff has succeeded in an action at law. This rule, however, is, as in the case of injunctions to restrain the commission of other torts besides nuisance, one of policy merely and is not based upon any lack of power in the court. A court of equity might,

(26) 34 Beav. 390.

if it wished to do so, interfere in the first instance and determine the question for itself. When the plaintiff has established a right against the defendant in a suit at law, it follows that he is entitled to an injunction, if it appears that the nuisance is of a character such that damages at law are not adequate compensation.

§ 165. Remedy at law must be inadequate. What is a nuisance of a character such that an injunction will be granted? In Swaine v. Great Northern Railroad Co. (27) the facts were these: The defendant railway company had a siding abutting on a road which was contiguous to the front of plaintiff's property. The defendant had at different times deposited and stacked upon the siding manure and other offensive matter, and had permitted it to remain there for a considerable time, and, as was to be expected under the circumstances, the odor that came from it was offensive and annoying to the plaintiff. The court decided that, though there might have been and probably was a legal nuisance at various times, the acts were not continuous enough to justify the court in interfering by injunction. Lord Justice Turner in his opinion said: "Nuisances, if temporary and occasional only, are not grounds for the interference of this court by injunction, except in extreme cases, and there is not, in my judgment, here a sufficient case for such interference." The question of course is one of degree, to be settled by a court in view of all the circumstances of each case, the real point being, whether, on the whole, an action or actions for damages will be an adequate remedy for the

(27) 4 DeG. J. & S. 211.

plaintiff. No more definite rule, can, from the nature of the case, be laid down.

§ 166. Nuisances causing physical injury to property. In order to be a nuisance, it is said, the act of the defendant must cause actual damage to the plaintiff. However, this actual damage, it seems, may consist either in some physical injury to the premises of the plaintiff or property of the plaintiff situated thereon, or some substantial interference with the comfort or convenience of the persons occupying or using the premises, even though no physical injury to the property is caused. The distinction between these two classes of nuisances is of considerable importance. If the nuisance is of the first kind, it is not material whether the plaintiff is at the time using the premises or not. A nuisance exists, in other words, if there be a material physical injury to the property, and, if it continues long or often enough, an injunction will be granted. For example, if the smoke from an adjoining factory is actually injuring the plants and trees of the plaintiff, it is immaterial whether he or any one else is living upon the premises or not. On the other hand, if no physical injury is being done, then, it would seem, if no one is in occupation of the premises, there is no nuisance at all, and the fact that discomfort or inconvenience would result if the premises were occupied, is not material. Under such circumstances, therefore, the defendant may permit all the noises or all the odors he pleases to escape upon my land, and I cannot complain, as no physical injury is done, and I am not rendered uncomfortable in any way. However, when I do go into occupation of the prem-

ises, the odors and noises, or the smoke, or whatever it may be, if they actually do substantially interfere with my comfort and convenience as occupier of the premises, are nuisances, and may be restrained.

§ 167. **Same: Illustrations.** Some concrete illustrations will serve better than anything else to bring out the distinction between these two classes of acts. In Mann v. Willey (28) the plaintiff owned land bordering upon the bank of a stream. She complained that the defendant, who owned land farther up, was discharging all the sewage from his house into the stream, and asked for a perpetual injunction, as well as for damage already sustained. The trial judge found the discharge of the sewage rendered the water impure and unwholesome and unfit for drinking and domestic purposes. The water did not appear, either to the smell or sight, to be at all affected, and the defendant argued that, inasmuch as the plaintiff had never used the water for any other purpose than bathing or driving a water wheel, she was not entitled to complain. The court, however, granted the injunction, and the real basis for the decision seems to be found in the fact that as a riparian owner the plaintiff had a property right to have the water in the stream come down substantially unpolluted and undiminished, and that the defendant was causing in this way an actual physical injury to the property in which the plaintiff had an interest.

A similar result has been reached in the case of a diversion of a portion of the water, so that the flow was appreciably diminished, the case turning again, not on the

(28) 51 App. Div. (N. Y.) 169.

question whether the plaintiff was actually using the water for any purpose which was interfered with by a diminution of the flow, but simply upon the physical invasion by the defendant of a property right to the plaintiff as a riparian owner. For example, in the case of Amsterdam Knitting Co. v. Dean (29) the defendant had diverted a portion of the water in a stream from the course in which it was accustomed to flow, the plaintiff being a lower riparian proprietor. The trial court found, however, that the damage sustained by the plaintiff in consequence of the act of the defendant was nominal only. The court held, nevertheless, that the plaintiff was entitled to an injunction to restrain a further diversion of the water, giving as a reason that, by the repetition or continuance of the act, the defendant in time would acquire a prescriptive right to continue the diversion, and that in all cases where this was the case, an injunction would be granted to restrain the continuance of the nuisance. It seems, however, that this is only another way of saying that the act in question is a nuisance because it causes a physical injury to the plaintiff's property rights, for defendant could not acquire a prescriptive right to do acts for which plaintiff meanwhile could not sue.

§ 168. **Hardship to defendant as defense.** In dealing with other branches of equity we have seen that in some cases the court of equity refused to interfere, if the benefit to the plaintiff to be derived from the extraordinary relief asked was small, in comparison with the loss that would be caused to the defendant. A similar principle

(29) 162 N. Y. 278.

has been applied in some of the cases dealing with nuisances. For example, in Richard's Appeal (30) the complainant owned a dwelling house and cotton factory, and the defendant had extensive iron works in the same village. The defendants were using bituminous or semi-bituminous coal in their factory, and, as their work was very extensive, the smoke from the iron mills injured the dwelling house as a dwelling, as well as blackened the stock of the cotton factory, rendering the fabric less salable. The court found that in the present state of the art the use of bituminous or semi-bituminous coal was necessary in the manufacture of iron as conducted by defendants, and no practicable method for consuming the smoke had as yet been devised, while, on the other hand the damage to the plaintiff's house and mill was not great and could be compensated for by payment of money damages. An injunction was accordingly refused.

§ 169. **Same: Opposing view.** The real question in cases of this kind, is, whether it is better to leave the plaintiff to successive suits at law for damages, or to inflict great pecuniary loss upon the defendant by closing an important industry? Other courts in similar cases have taken an opposite view from that of the Pennsylvania court, and have held that the injunction will be granted as a matter of course. An excellent example is found in the case of Hennessy v. Carmony (31) where the nuisance consisted in vibrations set in motion by the defendant. It was argued that, although the vibrations constituted

(30) 57 Pa. St. 105.
(31) 50 N. J. Eq. 616.

an active nuisance to the plaintiff, he would be left to sue at law on the ground of the smallness of injury to the plaintiff and the great inconvenience which would result to the defendant by the discontinuance of the nuisance. The court, however, granted the injunction, laying down the broad principle that, if the nuisance were actionable at law and continuous, an injunction will be granted as a matter of course. Apparently the New Jersey court did not inquire into the question, whether or not it would be possible for the defendant to carry on his business in a manner so that no nuisance would be created. Clearly, if it be reasonably feasible for the defendant to change the manner of conducting his business, in a case of this kind, so that no nuisance will exist, he should be compelled to do so, and undoubtedly the Pennsylvania court would so decree. As between these two views, the weight of authority seems to be in favor of granting the injunction, even though the actual damage to the plaintiff be small and the loss to the defendant be great.

§ 170. **Inconvenience to public as defense.** Perhaps a distinction ought to be drawn, as in the case of Daniels v. Keokuk Waterworks (32), between nuisances unavoidably created by public utility companies, that is, companies which serve the public directly, such as gas, water, and electric light companies, and private business enterprises, such as ordinary factories, which benefit the public only indirectly. In the case just cited, an injunction was refused because of the public inconvenience which would result from shutting off the water supply of the city. In

(32) 61 Iowa, 549.

this case, however, the smoke emitted by the defendant's works had not done any actual physical injury to the plaintiff's property, but had simply caused a certain amount of discomfort and inconvenience, sufficiently great, however, to entitle him to an action at law for damages. The rule which allows the injunction to issue in all cases of continuing nuisances has at least the great merit of simplicity, and perhaps may be further justified on the ground that the courts should leave it to the legislature to authorize the doing of such acts (if they can be constitutionally authorized) on payment of compensation to the injured property owner, so that they will no longer be a nuisance; and should not undertake to do this themselves indirectly, by refusing an injunction.

§ 171. **Right of owner of reversion to an injunction.** A reversioner, not entitled to the possession of real estate, is not ordinarily entitled to an injunction to restrain nuisances, which are such merely because they render the occupant of the premises uncomfortable. The tenant in possession is the one to complain of that. But if the nuisance is causing material physical injury to the property, clearly the reversioner is being damaged and has a right to an injunction to restrain any further maintenance of the nuisance (33).

§ 172. **Effect of statute of limitations.** In the case of continuing nuisances, the question arises as to the running of the statute of limitations against an equitable action for an injunction. The New York statute of limitations, for example, provides that equitable actions not

(33) Shelfer v. London Electric Lighting Co., [1895] 1 Ch. Div. 287.

otherwise provided for shall be barred in ten years from the time they accrue. In Galway v. Metropolitan Elevated Ry. Co. (34) the plaintiff had stood by and not interfered with the building of the elevated railway in the street, a proceeding which the court held interfered with his right to light and air in such a manner as to constitute a nuisance. The plaintiff had waited for more than ten years before he brought an action for an injunction The court held that as the company was each day and hour guilty of committing a fresh nuisance, the action for an injunction was not barred, and would not be so long as the plaintiff owned the premises, at least so far as this clause of the statute of limitations was concerned. Of course defendant might continue undisturbed so long as to acquire a prescriptive right against plaintiff, under the principles discussed in Title to Real Estate, § 161-62, in Volume V of this work.

§ 173. Effect of acquiescence by plaintiff. In the case just cited it was argued that the plaintiff had, by not objecting to the erection of the railroad structure, acquiesced in the disturbance of his right to light and air, and so was precluded from asking relief in equity. This the court denied, saying that mere inaction would not be sufficient, but admitted that a plaintiff might, by his conduct in encouraging the defendant to incur the expenditure involved, deprive himself of the right to ask for an injunction.

§ 174. Conditional injunction where defendant has power of eminent domain. It seems to be well settled by

(34) 128 N. Y. 132.

the cases that where the defendant, for example a railway company, may acquire by condemnation proceedings the right to continue to do the acts, which, as the matter stands, are illegal and nuisances, the court may, and frequently does, modify the injunction so that it is conditional only. The usual form under such circumstances is to provide for the issuance of an injunction, unless, within a reasonable time set by the court, the defendant acquires the right to continue the acts by purchase or by condemnation proceedings in due form. In some cases the relief has taken the form of suspending the decree for an injunction for a sufficient period for the defendant to acquire the right to continue the acts by conveyance from the plaintiff, the amount to be paid being fixed by the court. In this latter form the attempt is made to settle the whole matter in equity, without sending the plaintiff and defendant to another court for condemnation proceedings (35).

§ 175. **Damages as incidental to injunction.** In case a nuisance is of such a character that an injunction is granted, the almost universal rule is that the plaintiff may in the same action recover compensation for the damages already sustained, up to the time of the decree granting the injunction. This of course is another application of the general principle that equity, if it obtains jurisdiction of a case on grounds entitling a party to equitable relief, will proceed to dispose of the whole controversy, even to the extent of giving to the plaintiff damages which ordinarily would be recoverable in an action

(35) O'Reilly v. N. Y. Elevated Ry. Co., 148 N. Y. 347.

of law. Here, as elsewhere, if the court determines that no injunction should be granted, the plaintiff also fails to obtain by way of active relief the damages, if any, already occasioned, but is compelled to seek them in a legal action. It is probably true, however, under the codes of civil procedure in force in many of our states, that a plaintiff may so frame his complaint that, if the court decides he is not entitled to an injunction, he may still proceed in the same suit to obtain damages for the injury already inflicted.

§ 176. Injunction to restrain public nuisances. The nature of public nuisances as distinguished from private nuisances has already been suggested (§ 163, above). In the case of a public nuisance, the injury is primarily to the public at large, and consequently any redress in equity must, in so far as the nuisance is purely public in character, be brought by a representative of the public, usually the attorney general. One of the leading cases on the subject is that of the Attorney General v. Richards (36) in which an injunction was granted, ordering the defendant to abate as public nuisances certain buildings which he had erected on the sea shore between high and low water mark, so that they interfered with free navigation. In a recent case in Massachusetts (37) an injunction was granted preventing the erection of a building fronting on Copley Square in the city of Boston, above limits which had been established by the statute of Massachusetts for such buildings. The defendant objected on the ground that the attorney general had no right to bring the action,

(36) 2 Anstr. 203.

(37) Attorney General v. Williams, 174 Mass. 476.

but the court decided that he had. In another case a court in Arkansas decided that the projected Corbett-Fitzsimmons prize fight would constitute a public nuisance, and, on application of the attorney general of the state, issued an injunction restraining Mr. Fitzsimmons and the other persons concerned from holding the fight. In doing so, the court laid down the principle that, even though the public nuisance is also a crime, the injunction will issue in spite of the criminal character of the act and of the fact that ordinarily equity will not interfere by injunction to stop the commission of a crime simply because it is a crime (38).

Section 4. Infringement of Patents and Copyrights.

§ 177. Necessity for equitable relief. A valid patent confers upon the one who owns it the exclusive right to make, sell, and use the patented article. It is clear that many cases of infringement must arise in which damages will be suffered by the owner of the patent, if the infringement be allowed to continue, which cannot be properly estimated; indeed, cannot be more than guessed at. And it is also clear that the continuation of the infringement will give rise to a multiplicity of suits for the continued acts of infringement. Obviously, then, we should expect the chancellor to interfere in suitable cases by enjoining further infringement of the patent, and we accordingly find that equitable relief is thus granted.

§ 178. When prior determination of validity of patent

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(38) Attorney General v. Fitzsimmons, 35 Am. Law. Reg. 100. Compare In re Debs, 158 U. S. 564.

is necessary. As usual, the first question to confront us is as to the necessity for the plaintiff to establish the validity of his patent in a proceeding for this purpose, before resorting to equity for an injunction. Originally, in England, the validity of patents was tried at law, and so also in this country before 1819. A Federal statute in that year gave courts of equity jurisdiction of patent cases, wherever equitable relief was proper, and, in injunction suits, the validity of patents are almost always determined by the Federal courts of equity, on account of the impracticability of dealing with such questions by a jury (38a). More recently, the reformed procedure in England has reached the same result. This change of court, however, still leaves the question whether a plaintiff may obtain a temporary injunction against the infringement of an alleged patent, before a final decision in his favor in a direct proceeding in equity to establish its validity. The rule seems to be that if he has been enjoying the patent for a considerable time without opposition, or if he has been successful in establishing its validity in direct proceedings against other defendants, he can ordinarily secure the temporary injunction; otherwise not. The rule is stated as follows by Lord Cottenham, in a carefully worded opinion on this very point: "In doubtful cases, great care ought to be taken by this court not to grant an injunction which is at all likely to prove unfounded; because, if it turns out to be unfounded, you are doing an irreparable injury to the party restrained, while by withholding it you

(38a) Cochrane v. Deener, 94 U. S. 780, 782-84; Wise v. Grand Ave. Ry., 33 Fed. 277; Wyckoff v. Wagner Co., 88 Fed. 515.

may be permitting some infringement, but certainly not an injustice at all equaled by that which you are doing by improperly granting it. That rule, however, is confined to cases where there is a serious doubt in the mind of the judge as to whether the title to the injunction is made out or not. For, if the court see that there is a clear case for an injunction, it would be absurd to say, go to law and prove that which you have already proved here, before I grant the injunction. In patent cases . . . long and uninterrupted possession is considered such prima facie evidence of title as to justify the court in protecting the patent right by an injunction, until its invalidity, if it be invalid, shall have been established by an action at law" (39). The injunction is granted usually upon the condition that the plaintiff proceed without unnecessary delay finally to establish his right by appropriate proceedings. In the case just cited, the preliminary injunction was later dissolved because of the plaintiff's failure to try the action at law speedily.

§ 179. **Other considerations affecting temporary injunction.** From the statement of the rule above quoted, it is clear that if the plaintiff, in seeking a preliminary injunction, relies on previous enjoyment without opposition, he must show a public user of the patent, and, if he does not, will fail to obtain the temporary injunction (40). It seems also that, although the plaintiff has established the validity of the patent in a suit against other persons, so that ordinarily a temporary injunction would be

(39) Stevens v. Keating, 2 Phillips 333.
(40) Plympton v. Malcolmson, L. R. 20 Eq. 37.

granted, it will still be refused if the defendant establishes clearly, by new evidence not adduced in the previous suits, a state of facts which would probably have led to a different result in the previous litigation, if the evidence had been introduced there. In such a case, however, the burden is on the defendant to upset a prima facie case made for the plaintiff by his success in the former suit against others. The effect of the plaintiff's success in the prior litigation may also be nullified by the defendant showing that the judgment in the former suit was procured by collusion with the defendant in that suit, or by showing that the judgment thus obtained has been carried to a higher court on appeal and has not yet been finally determined.

§ 180. Balance of convenience. Putting the matter very simply, then, if the plaintiff's right to the patent, and the defendant's infringement, are clear, or a prima facie case has been made out on the basis of long continued user or prior litigation, a temporary injunction is ordinarily granted; but may, in particular cases be refused, if the balance of convenience is in favor of so doing. In the latter event, however, the defendant is usually required to give a bond to keep an account of sales and profits, pending the determination of the validity of the patent. On the other hand, if plaintiff fails to show a clear right to the patent, or to make out a prima facie case, or if the act of the defendant is not clearly an infringement, no preliminary injunction will ordinarily be granted (41). Even in such cases, however, it may be that the court will

(41) Standard Elevator Co. v. Crane Elevator Co., 56 Fed. 718.

feel that the balance of convenience is in favor of issuing a temporary injunction, and, in that event, it will be granted on the ground that more harm would be likely to result to the plaintiff by refusing it than to the defendant from granting it.

§ 181. **Infringement or threat of infringement necessary.** On ordinary equitable principles, it is clear that the plaintiff does not need the aid of a court of equity unless the defendant is actually infringing the patent or is threatening to do so. If therefore the defendant shows that he has finally ceased and abandoned in good faith all attempt at infringement, some cases hold that no relief may be had in equity, and the only relief to which the plaintiff is entitled is an action at law for damages (42). The weight of authority, however, is that a substantial infringement entitles plaintiff to an injunction despite defendant's recent cessation. "If defendant intends in good faith to keep its promise, the injunction will not harm it; otherwise, it will be a security for the complainants that their rights will not again be invaded" (42a). It is not necessary, on the other hand, for the plaintiff to wait until an actual infringement has taken place, if the defendant is threatening to infringe (43).

§ 182. **Substantial damage to plaintiff unnecessary.** In the case of the Campbell Printing Press Co. v. Manhattan Railroad Co. (44) the defendants admitted that they were

(42) General Electric Co. v. N. E. Electrical Mfg. Co., 123 Fed. 310.

(42a) N. Y. Filter Co. v. Chemical Bldg. Co., 93 Fed. 827; 22 Am. & Eng. Ency. (2d ed.) 475 (cases).

(43) Frearson v. Loe, L. R. 9 Ch. Div. 48.

(44) 49 Fed. 930.

using car couplers which infringed the plaintiff's patent, but asked the court to issue an injunction in such a form that they could continue to use the couplers already in use but no additional ones, and pay nominal damages for the infringement, on the ground that the plaintiff had never made, sold, or used the patented article, and had never licensed any one else to do so, while on the other hand the defendants were using it in the transportation of passengers. This request of the defendant was denied by the court, and the injunction issued to restrain the defendant from using the couplers already in use as well as any additional ones. It seems, however, that if the use of the infringed article had been actually needed in the service of the defendant in carrying the public, the injunction might have been refused as it was in a case in which the use of certain hose couplers protected by plaintiff's patent was not enjoined since the couplers were necessary for the daily use of the defendant city in the prevention of fires (45).

§ 183. **Acquiescence in infringement.** The mere failure of the owner of a patent to prosecute a suit for damages for infringement, or to bring a bill in equity for an injunction to restrain it, where the infringement has continued for years, is not acquiescence which will prevent the owner, when he does bring his bill, from obtaining equitable relief by way of injunction. "As well might it be claimed that an injunction would not be issued restraining a wrong doer from cutting the last half of the trees on my land, because I did not apply for an injunc-

(45) Bliss v. Brooklyn, 4 Fish. Pat. Cas. 596.

tion to restrain him from cutting the first half," said the court in a case of this kind (46). Acquiescence or delay in suing will, however, bar the plaintiff from a temporary injunction pending the establishment of the patent's validity (47).

§ 184. **Accounting for profits as incidental relief.** Following its usual procedure of settling the whole controversy in one suit, the court of equity, if the plaintiff makes out a case for an injunction, will decree that the defendant pay the plaintiff the profits derived from the use of the patented article. Owing, however, to the peculiar provisions of the statutes of the United States regulating the jurisdiction of the Federal courts in patent cases, it may be that the plaintiff who is not entitled to an injunction cannot recover, in an action at law, as such, the profits which an infringer has realized from the use of the infringed article, but is left to the action at law for damages provided by Congress, and may accordingly simply recover the damages which he has suffered from the defendant's acts (48). It would seem, however, that, upon principles of quasi-contract, the owner of the patent could recover at law the gains made by the infringer by the wrongful use of the patent (49). See Quasi-Contracts, §§ 16-19, in Volume I. Finally, it should be noted that under the act of Congress of July 8, 1870, c. 230, the plaintiff in the equity action who seeks an injunction is entitled

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(46) Ide v. Trorlicht, 115 Fed. 137.
(47) Hockholzer v. Eager, 2 Sawy. 361.
(48) Root v. Railway Co., 105 U. S. 189.
(49) See Head v. Porter, 70 Fed. 498 (discussing cases).

to a decree for damages, in case the damages suffered are greater than the profits.

§ 185. Infringement of copyrights. Under the copyright laws the exclusive right to multiply copies of the copyrighted work is vested in the owner of the copyright. We are here concerned only with actions for relief in equity in case of actual or threatened violation of a copyright. Here, as always, the question of inadequacy of remedy at law is at the basis of the jurisdiction of equity. Clearly the damages to the owner of a copyright from infringements are largely speculative, and so equitable relief is needed in the case of continuous acts of infringement. In the United States, the relief obtainable in equity, as in the case of patents, is affected by the fact that the Federal courts have only a limited jurisdiction. Bearing this in mind, let us see how the authorities stand. If the defendant admits, which he usually does not, the fact of the infringement, an injunction will be issued against further infringement if there be any serious ground for anticipating its continuance. If, however, as is usually the case, the right is disputed, the question again arises as to the granting of a temporary injunction, pending the determination of the validity of the plaintiff's claim. Substantially the same statements may be made here which were made above in discussing the right to a temporary injunction in the case of infringement of a patent (50). In case, at the hearing, the plaintiff succeeds in establishing his right and the infringement by the defendant, the temporary injunction (if one had been

(50) McNeill v. Williams, 11 Jurist, 345.

granted previously) is made permanent, or a permanent injunction is issued if no temporary injunction had previously been granted. In addition, the plaintiff is entitled, as in the case of patents, to an accounting for profits made by him from the infringement. In England, under their statutes, the plaintiff may, in the same suit, obtain an injunction and damages, as distinguished from profits. In the United States, owing to the absence of such a statute, he cannot do so, but must sue at law for his damages, instead of profits (51). If the infringement be established and the injunction issued, any copies of the infringed article will be ordered delivered up to be destroyed. Again, as in the case of patents, merely standing by and permitting, though not encouraging, the defendant to commit the infringement, is not such acquiescence as will prevent the plaintiff from maintaining a bill for a permanent injunction, though it will be ground for refusing one pending the hearing on the validity of the copyright.

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(51) Chapman v. Ferry, 12 Fed. 693.

CHAPTER IX.

BILLS OF PEACE.

§ 186. **Meaning of term "bills of peace."** In the part of the preceding chapter on the jurisdiction of equity to enjoin the commission of trespasses (§ 149), we saw that in the case of continuing trespasses doing no permanent injury to the property, the chief reason for granting the equitable relief was the inadequacy of the remedy at law arising from the multiplicity of suits which would result if the injured party were left to bring successive suits at law for damages as the acts were committed. This principle of preventing a multiplicity of suits has been applied by equity to other situations, and the name *bills of peace* has been applied to equitable suits of this character. Usually, however, the large number of suits results from the fact that the number of the plaintiffs or the number of the defendants is large. We shall see that in many cases the sole result of the application of the principle of preventing multiplicity of suits is to permit the consolidation into one of a number of suits in equity all embracing the same questions of law or of fact. In other cases, the sole right of the parties to obtain equitable relief is based upon the existence of a large number of suits at law. Both classes of cases, however, are usually treated under the heading "bills of peace."

§ 187. Several plaintiffs separately entitled to equitable relief. In the case of Younkin v. Milwaukee Company (1) the defendant was taking for railroad purposes, without legal right to do so, the street in front of the premises of the plaintiffs. Each plaintiff would separately be entitled to an injunction to restrain the defendant from taking the street in front of his premises for such purpose. The question in each case would have been the same, namely, is the building of the railroad a proper purpose for which a street may be used? Exactly the same facts and the same law would be involved in each case. For that reason the plaintiffs were permitted to join and bring one suit asking for the injunction. In this way the court is relieved from having a large number of separate suits all involving precisely the same question, and incidentally the expenses to each of the plaintiffs are greatly reduced. It should be noticed, however, that if any plaintiff seeks not only an injunction to restrain the further commission of the trespass in such a case, but also asks for damages for the trespasses already committed, he cannot join with the other owners, for different questions of fact and law would then be involved in the different suits. The amount of damages inflicted on one plaintiff would obviously be no guide as to the amount inflicted on another. It was accordingly held in the case cited that no relief by way of damages could be had when a number joined in the same suit.

§ 188. Several plaintiffs not separately entitled to equitable relief. A conflict of authority exists, whether

(1) 112 Wis. 15.

the mere fact that a large number of suits at law, each on behalf of different persons, would result from the act of a defendant, affords a basis for permitting the persons who would thus be injured to join in one suit in equity. In the case of Sang Lung v. Jackson (2) the bill was brought by a large number of plaintiffs, each one of whom had a distinct interest in certain teas which were about to be destroyed by the defendant, the United States collector, acting under an act of Congress requiring the destruction thereof, it being claimed by the plaintiffs that the act in question was unconstitutional. Admitting that the act of the collector in destroying the tea of any one plaintiff could be adequately dealt with in a court of law by an action for damages, the court nevertheless held that, because of the multiplicity of suits which would result if the defendant were allowed to act and destroy the teas in question, the plaintiffs had the right to join in one suit in equity and obtain an injunction to restrain the defendant from acting until the constitutionality of the law could be passed upon, and, if the law proved to be unconstitutional, to have the injunction made permanent.

§ 189. **Same: Conflicting decisions.** The contrary view, however, has been taken in other cases. For example, in Dodd v. Hartford (3) the plaintiff sought an injunction restraining the defendants from enforcing the collection of certain assessments, on the ground that they were void, it being admitted that the relief which each plaintiff would obtain at law was adequate, and that sep-

(2) 85 Fed. 502.
(3) 25 Conn. 232.

arately the plaintiffs would not be entitled to an injunction. The court held that the mere fact of a large number of persons being affected gave no basis for equitable relief by way of injunction. In McTwiggan v. Hunter (4) the opposite result was reached on a similar state of facts. It should be noticed, also, that in a few jurisdictions in a case of this kind each plaintiff would be entitled to an injunction in equity, to stop the illegal tax proceeding and therefore the suits would be consolidated into one, as we saw in § 187, above. In another case (5) 373 plaintiffs, on behalf of themselves and of all others similarly situated, sought to enjoin the city from enforcing an assessment which they claimed was void. Although each plaintiff separately had an adequate remedy at law, the bill was allowed on the ground that compelling the plaintiff to resort to law would result in filling courts with useless litigation, as the only question at issue in each one of the suits would have been one and the same: was the assessment void or not?

§ 190. **A plaintiff entitled to equitable relief against several defendants separately.** In the case of Sheffield Waterworks v. Yeomans, (6) the plaintiff sought relief against a large number of defendants, all holding certificates which, while apparently valid, it was alleged were not so in fact, because issued by persons without authority. Constituting, however, apparently valid claims against the waterworks company, they could be so used as greatly to prejudice the company, and for that reason it

(4) 18 R. I. 776.
(5) City of Chicago v. Collins, 175 Ill. 445.
(6) L. R. 2 Ch. App. 8.

seems that equity would have decreed a cancelation as against any of the defendants. The invalidity of all the certificates depended on the same questions of fact and of law, and it was accordingly held that the plaintiff was entitled to bring in one suit all the actions against the different defendants, and have the question determined once for all. In the case of Smith v. Bivens (7) each of the defendants was separately trespassing on the plaintiff's land with cattle, and their acts were so continuous that the plaintiff would have had an equitable action against each one separately for an injunction. The question of the constitutionality of an act of the legislature of the state in question, requiring the plaintiff to fence off from his land the cattle of the several defendants, was the only question in dispute in each and every case. If the legislative acts were constitutional, the acts of the defendant were not trespasses; otherwise they were. The several equity suits therefore all involved exactly the same question of law, and it was accordingly held that the plaintiff was entitled to join them all in one suit.

§ 191. Nuisance by several defendants acting independently. An interesting question arises in a class of cases in which the act of any one of the defendants is not of itself a legal wrong of any kind; but, added to the acts of others who are acting independently of the defendant, causes damage to the plaintiff. The first question to be settled is whether the defendants are guilty of any legal wrong in such a case. That question must be answered before we can discuss the question of equitable relief. For ex-

(7) 56 Fed. 352.

ample, in Lambton v. Mellish (8) each of the defendants was, for his own purpose and acting independently of the others, playing the organ connected with a merry-go-round in the vicinity of plaintiff's house. Assuming that the playing of any one was not sufficient to constitute a nuisance, the court found that the result of the combined noises was such that, had it been produced by one defendant, or by any number of defendants acting in concert, it would have constituted an actionable nuisance It was held that, under these circumstances, a legal wrong was being committed, and constituted a continuous nuisance. This being so the plaintiff was permitted to bring an action in equity joining all the parties as defendants, and was granted an injunction to stay the continuation of the nuisance. It has been held, however, in cases of this kind, that the defendants cannot be joined for the purpose of recovering compensation by way of damages for the tort, as each suit then involves different questions from any other suit.

§ 192. **Plaintiff not entitled to equitable relief against several defendants separately.** Suppose the plaintiff has against each of several persons a right to sue at law to recover a sum of money and each suit is based upon the same state of affairs, although each case is entirely separate from the others. May the plaintiff file a bill in equity joining all of the defendants, thus enabling him to recover in one suit? This was the question which was presented in Thompkins v. Craig (9) in which a receiver of an in-

(8) [1894] 3 Ch. 163.
(9) 98 Fed. 885.

solvent bank sought to collect an assessment levied on each of the defendants, who were stockholders in the bank, under a statute which provided that all stockholders of a banking corporation should be "individually and severally liable to the creditors of such association or corporation of which they are stockholders or shareholders, over and above the amount of stock by them held therein, to an amount equal to their respective shares so held, for all its liabilities accruing while they remain such stockholders." The amount of the assessment had been fixed by the district court and sustained by the supreme court of the state in a suitable proceeding brought for that purpose. The bill was dismissed on the ground that equity had no jurisdiction—the plaintiff must sue each shareholder separately at law. The decision seems to be correct for the reason that various defenses might be used by different defendants, one alleging that he had paid his assessment, another that his subscription for stock had been void from the beginning and so he was not liable to pay the assessment, and so on. A similar result was reached in the case of Marsh v. Kaye (10), in which the suit was against the directors of a corporation for their statutory liability for the debts of the corporation.

§ 193. **Several similar suits in equity against one defendant.** Suppose a number of plaintiffs are suing the defendant in equity, each suit involving the same questions of law and of fact. For example, consider the case where a covenant restricts the use of land, say an agreement to use the land for private residential purposes only. Sup-

(10) 168 N. Y. 196.

pose the defendant is using the land in a way which he thinks comes within the meaning of that term, but his neighbors take the opposite view. Suppose several of them have, each separately and for himself, started injunction proceedings against the defendant. Here the question involved in each case is one and the same, namely, the meaning of the phrase "private residential purposes." It seems clear that here the defendant would be entitled to have the suits consolidated and tried as one.

§ 194. **Several suits at law against one defendant: Same questions of law.** In the case of Third Avenue Railroad Co. v. Mayor of New York (11) the plaintiff railroad company sought to enjoin the further prosecution of all but one of a large number of suits at law, brought against the plaintiff company for violating an ordinance of the defendant city forbidding the running of railway cars in said city without a license. The plaintiff claimed that the ordinance was invalid, and, if that were true, in none of the suits at law could the plaintiff recover; while, if the ordinance were valid, the defendant would consent to judgment in all the suits at law. It clearly appearing that the validity of the ordinance could be as fully tested in one suit as in all, an injunction was issued restraining the further prosecution of all but one of the suits at law, the injunction to be made permanent if the ordinance in question was found to be invalid in that one suit, and the injunction to be dissolved if the ordinance was upheld. Equitable relief has, however, been refused

(11) 54 N. Y. 159.

in other jurisdictions on similar states of facts, but the view of the New York court seems the better.

§ 195. **Same: Same questions of fact.** In Tribette v. Illinois Cent. Ry. Co. (12) the plaintiff railroad sought an injunction restraining the prosecution at law of a large number of suits for damages, all brought by different plaintiffs, who were made defendants in the equity-proceedings. Each plaintiff at law was seeking to recover damages for loss by fire alleged in each case to have resulted from the same act of the defendant at law (plaintiff in equity), in allowing sparks to escape from its engines. The plaintiff in equity (defendant at law) alleged in its bill that the fire did not originate through fault or negligence on its part, and that therefore none of the defendants in equity had as plaintiffs at law any right to recover. The court refused to grant the injunction, but it seems doubtful whether the decision is correct, and other courts have reached the opposite result (13). If we assume that the company's statement is correct, it is clear that none of the defendants could recover anything at law. Shall we allow this same question of fact to be litigated before as many different juries as there are plaintiffs at law, or determine it once for all? Assuming that a temporary injunction has been granted restraining the suit at law, the sole question for the court of equity would be as to the negligence of the railroad company; if that question should be found in favor of the company the injunction would be made permanent. If the result should

(12) 70 Miss. 182.

(13) Guess v. Ry. Co. 67 Ga. 215.

be unfavorable to the company, the injunction would be dissolved and the cases at law be allowed to proceed, each on its own merits, as to the questions of damages and any special defenses there might be, other than defendant's care.

§ 196. Successive suits at law between same parties. In cases in which the defendant in equity, who has previously been unsuccessful in one or more suits at law all based on the same alleged right, in spite of his failures insists on bringing new suits at law, which clearly will be unsuccessful, an injunction will be granted restraining the continuation of the proceedings (14). It seems that, at least according to the modern view, one verdict at law against the defendant is sufficient (15). It should also be noticed that a verdict against the defendant is not necessary if the defendant is vexatiously instituting and abandoning repeated actions at law against the plaintiff. Such conduct ought to be and will be enjoined (16).

§ 197. Bills in the nature of bills of peace. In all the cases considered so far, we find that when the bill of peace was allowed, it was because some one or more questions of fact or law were common to all the suits, and equity allowed the consolidation of the equitable suits or restrained the suits at law in order to permit those common questions to be settled once for all. Some courts, however, have extended the jurisdiction of equity to include cases involving large numbers of parties, where no common questions of law or fact were involved, but where

(14) Pratt v. Kendig, 128 Ill. 293.
(15) Patterson Co. v. Jersey City, 9 N. J. Eq. 434.
(16) Kaerns v. Kaerns, 107 Pa. St. 575.

the situation at law was so complicated that apparently the machinery of the law court was not competent to deal with it adequately. For example, in the case of National Park Bank v. Goddard (17) the plaintiffs, as creditors of Levy & Co., had attached certain property. The defendants, forty or fifty in number, each claimed that Levy & Co., who were insolvent, had purchased from them by fraudulent representations the goods which the plaintiff had attached, and were beginning actions of replevin, each for what he claimed were his goods. These goods were inextricably confused in one mass, some of them being already made into garments. The court granted the injunction restraining the suits at law, and undertook in one suit to settle all the rights of the parties in the property in question, on the ground that it would be impossible for a court of law, in fifty different suits, to deal adequately with the situation. The result seems to be a just one, and entirely in keeping with equitable principles.

(17) 62 Hun (N. Y.) 31.

CHAPTER X.

BILLS QUIA TIMET.

Section 1. Cancelation and Surrender of Contracts.

§ 198. Cancelation of negotiable instruments obtained by fraud. If by fraudulent representations one person induces another to enter into a contract with him, and they reduce the contract to writing, a situation results which in many cases calls for equitable relief. According to the common law view, the fraud does not prevent the contract from arising, but does give to the promisor a defense to a suit for breach of the same. If the written contract be in the form of a negotiable bill of exchange or a promissory note, the danger is, if the instrument be still in the hands of the fraudulent promisee, that he may negotiate the same for value to a person who buys without notice of the defense based upon the fraud. In such a case, according to the law governing negotiable instruments, the buyer, being a bona fide holder for value, would acquire a right to enforce the instrument against the promisor free from the defense of fraud. Accordingly, because he fears (Lat.—quia timet) that this may be done, the victim of the fraud may obtain a decree from equity ordering the surrender for cancelation of the nego-

tiable instrument in question (1). A suit for this purpose is called a *bill quia timet.*

§ 199. Cancelation of non-negotiable instruments obtained by fraud. If the written instrument be not negotiable, the danger just referred to does not exist. Nevertheless, if the invalidity of the instrument be not apparent on its face, as it is not in the case where it is obtained by fraud, it may happen that after a lapse of time the promisor may become unable to establish the facts of the case. For example, some of the witnesses upon whom he relies may die. Because he fears (quia timet) that this may happen, he is entitled, at least according to some courts, to equitable relief by way of cancelation. For example, in Commercial Insurance Co. v. McLoon (2) a policy of insurance obtained by means of fraudulent representations was ordered cancelled. In the case of Fuller v. Percival (note 1, above), as the note in question was overdue, it could not have been transferred so as to free it of the defense of fraud, but the decree of cancelation was given in spite of this. In some jurisdictions, however, relief has been denied on the ground that in a suit on the instrument the plaintiff would have a perfect defense; and, if there were any real danger of his losing his testimony to establish the fraud by the death of witnesses, he could, under the provisions of law providing for the perpetuation of testimony, have the witnesses' testimony taken, even though no suit on the instrument had been brought. That cancelation may be had in such a case,

(1) Fuller v. Percival, 126 Mass. 381.
(2) 14 Allen (Mass.) 351.

however, seems to be the more reasonable rule, as it enables the matter to be closed up without delay, and avoids the necessity of taking testimony in different proceedings from the suit itself.

§ 200. **Same: Action already pending at law.** If, however, the person holding the instrument is already suing on the same, as was the case in Buxton v. Broadway (3), the necessity for the intervention of equity seems not so obvious. On the one hand, it may be argued that the plaintiff in equity, as defendant in law, may avail himself of the defense and requires no relief in equity. On the other hand, and this seems to be the view of the Connecticut court in the case just cited, the defendant in equity (the plaintiff at law) may withdraw the suit at any time before judgment and begin over again at a later date, and in that event the situation would be essentially the same as though no action had been brought. For that reason cancelation was decreed. Courts that take the other view argue that equity should not interfere in such a case, on the ground that the defendant in equity, as plaintiff at law, would be entitled to have the verdict of a jury on the question of the existence of the fraud—a pure question of fact—and permitting the equitable suit for cancelation results in the determination of this question of fact by equity without a jury. The weight of authority in America seems to be in favor of granting equitable relief in this class of cases, but the Supreme Court of the United States has lent the weight of its name to the op-

(3) 45 Conn. 340.

posite view (4). In the English case of Hoare v. Bremridge (5) the suit at law was begun after the bill in equity for the cancelation had been filed, and a bill for an injunction restraining the prosecution of the suit at law was refused, but the bill was retained so that, in case the suit at law were not speedily prosecuted, the court of equity could then proceed to determine the matter as it would have done had no suit at law been begun.

§ 201. **Same: Several suits pending at law.** In McHenry v. Hazard (6), jurisdiction was taken of a suit to cancel an instrument alleged to have been obtained by fraud, where two different persons each claimed to be assignees of the instrument in question, and each had begun a suit against the plaintiff on the same. The ground on which the court of equity assumed jurisdiction was that the verdict in favor of one of the plaintiffs at law would not preclude the other party at law from recovering in his suit, and that thereby the plaintiff in equity, as defendant at law, ran the risk of a double liability. For that reason the court of equity assumed jurisdiction of the whole controversy, and stood ready to decree cancelation if the fraud was established.

§ 202. **Cancelation of instruments invalid on their face.** If the invalidity of the instrument, whose cancelation is sought, appears upon its face, so that, if a suit were brought upon it at law, the plaintiff in equity as defendant at law would be able to avail himself of it without the necessity of introducing any extrinsic evidence, it is clear

(4) Grand Chute v. Winegar, 15 Wall. 373.
(5) L. R. 8 Ch. App. 22.
(6) 45 N. Y. 580.

that equitable relief is not necessary and the authorities so hold (7).

Section 2. Removal of Cloud on Title.

§ 203. **Necessity for equitable relief.** If the instrument, which the defendant holds, conveys or purports to convey the title to property or an interest therein, or to create a lien upon it, the necessity for equitable relief clearly appears, when we recall the rule which prevents a seller of real estate from obtaining a decree for specific performance if the title he offers the buyer is not free from reasonable doubt as to its validity (§ 21, above). The result of that rule is that, if the defendant has the instrument in question, it casts a cloud upon the plaintiff's title, so that he cannot dispose of his property at its fair value. Relief in equity is therefore necessary in this case, not because the plaintiff fears that he may at some time in the future become unable to establish the invalidity of the defendant's deed or other instrument, but because at the present moment the existence of the instrument in question is diminishing the salability of his property. As we shall see, the failure of some courts to distinguish between the bill quia timet, based upon the apprehension of future danger, and that to remove a present injury, has led to unfortunate results.

§ 204. **Cancelation of deed obtained by fraud.** According to the principles of the common law, fraud practiced by a grantee in obtaining a deed to property does not

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(7) Simpson v. Lord Howden, 3 Mylne & Craig 97; Sheldon Co. v. Mayers., 81 Wis. 627.

prevent the title from passing under the deed, and accordingly the holder of such a deed can successfully maintain an action at law against the defrauded seller for the recovery of the possession of the property. In addition, the seller can not market the property, as he can not give a good title to it. Under such circumstances, at the request of the defrauded seller, equity will intervene and decree a cancelation of the deed (8). In cases of this kind, in which the title has passed by virtue of the instrument sought to be canceled, it is not material which party is in possession of the property.

§ 205. **Cancelation of invalid deed by plaintiff in possession of property.** If an instrument which apparently creates an interest in property is legally invalid, but the invalidity does not appear upon the face of the instrument, whether equitable relief is needed or not depends upon who is in possession of the property. If the legal owner, who complains of the existence of the invalid instrument, is out of possession, then, since the instrument constitutes no valid legal interest, he has a complete and adequate relief at law in the form of an action to recover possession of the premises. In that action the invalidity of the instrument in question would be established (9). If, however, the owner be in possession and the one holding the invalid instrument is not suing to recover possession, the owner of the property needs equitable relief on the grounds stated above. It is accordingly held, at least by a majority of courts, that he is entitled to cancelation

(8) Martin v. Graves, 5 Allen (Mass.) 601.
(9) Keane v. Kyne, 66 Mo. 216.

of the invalid instrument. For example, in Sherman v. Fitch (10) the defendant held an invalid instrument, which purported to be a mortgage upon the personal property of the corporation of whose property the plaintiff was assignee for the benefit of creditors. The plaintiff wished to sell the property, but of course could not do so to any advantage so long as the apparently valid but actually invalid mortgage was in existence. In decreeing cancelation, the court said: "We cannot see that the complainants, upon this state of facts, have any remedy at law. They have no cause of action against the defendant. They are in possession of the property, and he has not disturbed their possession. He might bring an action against them, but he does not choose to do it. In the mean time there is a cloud upon their title, which seriously affects its value. The mortgage is upon record, and it is evident that they cannot sell the property with any prospect of obtaining its fair value, because the purchaser would know that he exposes himself to an action, if the defendant's claim is well founded."

§ 206. **Same: Contrary view.** On the other hand, in the case of Loggie v. Chandler (11) the opposite conclusion was reached, the court erroneously applying the rule we have already examined, based upon the fear of future loss only and not upon the present damage to the salability of the property. If neither the plaintiff nor the defendant be in actual possession of the premises, that is to say, if the property is vacant, the plaintiff is equally in need

(10) 96 Mass. 59.
(11) 95 Me. 220.

of equitable relief. Under such circumstances, the one in whom the legal title is vested is deemed in constructive possession of the property, and so cannot bring an action to recover the possession of the property against the holder of the invalid mortgage or instrument. The result is that, unless the holder of that instrument sues him at law, he cannot, unless allowed to file a bill in equity, litigate the validity of the instrument in question (12).

§ 207. **Protection to title acquired by adverse possession.** It is the almost universal rule of the courts that a person, who has been in the adverse possession of property for the required statutory period, acquires an indefeasible title to the same. This being so, the question arises, may plaintiff, who has thus acquired title by adverse possession, maintain a bill in equity against the holder of the record title to prevent him from claiming any interest in the premises? Almost without exception the cases hold that he may (13).

§ 208. **Cancelation of instrument invalid on its face.** If the invalidity of the instrument which the defendant holds is *clearly* apparent on its face, obviously no relief is required in equity, for the plaintiff has nothing to fear if sued, and is suffering no damage (14). If the invalidity appears, not on the instrument itself, but *clearly* appears on the face of the public records of the title to the property, the same rule is applied. It has been decided, however, in a suit in a state court, that this rule does not apply to the records of the United States land office, they

(12) O'Brien v. Creitz, 10 Kan. 202.
(13) Arrington v. Liscom, 34 Cal. 365.
(14) Scott v. Onderdonk, 14 N. Y. 9.

being regarded as foreign records (15). Unfortunately, the courts do not agree as to when the invalidity is apparent on the face of the instrument or other record. Apparent to whom? it may be asked. Shall we say to one skilled in the law, or to an ordinary business man? Clearly the latter, if we look at the marketability of the title of the plaintiff, but many courts, following the principles underlying the bill quia timet, based upon apprehension of future danger, have refused relief if the invalidity is such that it would be apparent to one who knew the law.

§ 209. **Cancelation where invalidity must appear in suit on instrument.** It also seems unjust to deny cancelation, as many cases do, where the holder of the instrument, its invalidity not appearing on the face, must, in seeking to enforce his claim, inevitably disclose its invalidity. To deny relief is to make the error again of basing relief upon the danger of what may happen in the future, rather than upon the present injury to the plaintiff in diminishing the market value of his property (16). In a few jurisdictions, however, relief is granted in this class of cases, and this seems to be the better view.

§ 210. **Cancelation where burden of proof will be on holder of instrument.** In the case of Scott v. Onderdonk (note 14, above), cancelation was denied of a certificate of purchase, made under a tax sale which was invalid, on the ground that, should the defendant attempt to enforce the deed which he was seeking to obtain from the proper

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(15) Gile v. Hallock, 33 Wis. 523.
(16) Dewelse v. Reinhard, 165 U. S. 386.

officer in exchange for his certificate of purchase, he would, as plaintiff, have the burden of proving the validity of the tax sale, which, in the case in question, he would not be able to do. Here again the court looked at the possible damage in the future and not the immediate injury. Nevertheless the case is followed in a large number of jurisdictions. The difficulty with the situation appears more plainly when we observe, that, in most cases of this kind, if the plaintiff has agreed to sell the property in question, and the purchaser refuses to take title because of the existence of the apparently valid though actually invalid instrument, equity would refuse to compel the buyer to accept the title on the ground that there was a "reasonably decent probability of litigation." Fortunately, other courts have taken a more enlightened view and give relief in such cases (17). It must be confessed that, on the whole, the rules followed by probably a majority of our courts, in dealing with bills to remove clouds on title, constitute one of the most unsatisfactory parts of equity jurisdiction.

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(17) Bishop v. Moorman, 98 Ind. 1.

CHAPTER XI.

BILLS OF INTERPLEADER.

§ 211. **Necessity for equitable relief.** The machinery of the common law courts offered no satisfactory solution for problems similar to those involved in the case of Kile v. Goodrum (1), in which each of two persons claimed to be the party designated by a business name in a certain instrument on which the plaintiff was liable, and the plaintiff was therefore in the situation that, if he paid one, the other might sue him and establish in that suit that he was the one named in the instrument. In fact, it was conceivable that each one might sue at law and obtain a judgment, as neither would be barred by a judgment secured by the other to which he was not a party, and the common law offered no means of getting all three parties together in one proceeding. This being so, equity permits the one thus subjected to the risk of a double liability to bring a *bill of interpleader* in equity, making the rival claimants defendants, in which all suits at law are enjoined, and the applicant for interpleader is allowed to pay the money into court to be handed over to the one ultimately found to be entitled to it. Another example of the same kind of situation is found in the case of Morse

(1) 87 Ill. App. 462.

v. Stearns (2), the rival claimants in that case each claiming to be the legatee named in a will.

§ 212. **Applicant must be impartial stakeholder.** The remedy by way of interpleader was designed to protect one who stood in the position of a stakeholder without claiming any interest in the property. Accordingly, after the bill has been filed, the money or other property passes into the custody of the court, and the plaintiff, having no further interest in the subsequent proceedings between the rival claimants, is not entitled to be heard in them (3). For the same reason, the plaintiff cannot appeal from the decision in favor of one of the claimants and against the other (4). Likewise, the plaintiff must remain strictly impartial and not ally himself in any way with either of the claimants. If he does so, he loses his right to maintain the bill (5).

§ 213. **Applicant must claim no interest in property.** Following the same principle, equity refuses interpleader to the plaintiff who claims any interest in the subject matter of the controversy. For example, in National Bank v. Lanahan (6) the plaintiff claimed to be entitled to a portion of the fund in his hands, as a commission for his services, and interpleader was denied. So also, if the plaintiff agrees with one of the adverse claimants to recognize his claim, and, in consideration therefor, takes the agreement of that claimant to indemnify him

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(2) 131 Mass. 389.
(3) St. Louis Co. v. Alliance Co., 23 Minn. 7.
(4) Atkinson v. Flannigan, 70 Mich. 639.
(5) Ludlow v. Strong, 53 N. J. Eq. 326.
(6) 60 Md. 477.

against the claim of the other, he loses his right to maintain the interpleader proceedings. However, it should be noted that the claimant giving the indemnity cannot, in such a case, object on that ground, the right to do so being restricted to the other claimant (7).

§ 214. **Claimant cannot file bill of interpleader.** The stakeholder is the only one who is permitted to bring the interpleader proceedings. Neither one of the claimants can, for the obvious reason that he is not a stakeholder, but claims an interest in the subject matter of the controversy (8).

§ 215. **Illustrations of interpleader proceedings.** Owing to limits of space, many of the details concerning bills of interpleader must be omitted. A few cases will serve perhaps to bring out the scope of the relief afforded. In a number of cases, of which Webster v. Hall (9) is one, the plaintiff had offered a reward for the discovery and conviction of persons who had stolen property, or for some other reason. Two or more claimants claimed the reward, and the plaintiff filed a bill of interpleader. The bill was allowed, and the same result is reached by most of the authorities. A minority hold that no interpleader will be allowed in these cases, for it may turn out that neither party is entitled to the reward, and the money would, in that event, come to the plaintiff, which is believed to violate the rule of interpleader as stated above. In a case of this kind, it would of course be an essential part of plaintiff's case to admit the indebtedness and

(7) Thompson v. Wright, L. R. 13 Q. B. D. 632.
(8) Sprague v. West, 127 Mass. 471.
(9) 60 N. H. 7.

willingness to pay the one lawfully entitled; and, if he does that, it seems very technical, to say the least, to deny interpleader on the ground suggested by the minority. In another case (10) plaintiff had placed in his hands the sum of £29 to abide the event of a steeplechase. Under the laws of England the steeplechase was illegal, and neither of the parties to it could recover the sum in question from the stakeholder. The bill therefore clearly showed on its face that neither of the claimants was entitled to recover, and was accordingly dismissed.

§ 216. **Affidavit of applicant.** An affidavit by the stakeholder that he is not in collusion with any of the claimants is required. The object of this is to prevent the remedy by way of interpleader from being abused. The affidavit may be annexed to the bill or filed with it as a separate paper, and must state that plaintiff does not bring the bill in collusion with any of the claimants, but spontaneously, for his own security (11).

§ 217. **Applicant entitled to interpleader if in reasonable doubt.** In order to maintain a bill of interpleader, it is not necessary for the plaintiff to show that it is absolutely impossible for him to ascertain on investigation which party is entitled. If a reasonable doubt exists, he is entitled to the aid of the court of equity, even though he might, by great attention and caution, determine the matter for himself. The object of interpleader is to relieve the plaintiff from doing that very thing (12). Nor

(10) Applegarth v. Colley, 2 Dowl. (N. S.) 223.
(11) Mt. Holly Co. v. Ferree, 17 N. J. Eq. 117.
(12) Farley v. Blood, 30 N. H. 354.

is it necessary that any of the claimants shall have begun suit. It is sufficient if they are rival claimants (12).

§ 218. **Bills in the nature of interpleader.** The injustice resulting from the very strict rules governing interpleader, especially that which denies to the plaintiff the right to claim any interest in the subject matter, is remedied in part by allowing relief in an equitable action known as a *bill in the nature of interpleader,* in which the plaintiff may secure relief, although he does claim an interest in the subject matter. Space permits only one or two examples. In a large number of cases, a mortgagor has been permitted to file a bill seeking to redeem his mortgaged property, joining as defendants rival claimants to the mortgage debt (14). Similarly, a pledgee of a chattel has been allowed to maintain a bill for the sale of the pledged chattel, in order to enable him to realize on the security, the defendants being adverse claimants to the chattel and also to the surplus which would be left over after the debt due to the plaintiff had been paid (15). Bills in the nature of interpleader are allowed only where the plaintiff has an independent *equitable* right of action, to which the interpleader relief is incidental. They are never allowed where the plaintiff has no other right, or only a legal one (16).

§ 219. **Statutory interpleader.** In some jurisdictions today there are statutory interpleader proceedings, which usually permit the defendant, when sued by one, to bring

(13) Newhall v. Kastein, 70 Ill. 156.
(14) Koppinger v. O'Donnell, 16 R. I. 417.
(15) Crass v. Memphis Co., 96 Ala. 447.
(16) Aleck v. Jackson, 49 N. J. E. 507.

the other claimants directly into that suit, or sometimes permit the rival claimant to intervene on his own initiative. It is usually held that the introduction of statutory interpleader does not abolish equitable interpleader, and that the plaintiff who would, under the rules of the latter, be entitled to bring a bill of interpleader is still entitled to do so (17).

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(17) Dubois v. Union Co., 89 Hun (N. Y.) 382.

TRUSTS AND TRUSTEES

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CHAPTER I.

ORIGIN AND NATURE OF TRUSTS.

Section 1. Uses and the Statute of Uses.

§ 1. Antiquity of uses. Almost everyone has at some time in his experience known of a case in which property was placed in the hands of a person called a trustee, to be held by him, not for his own use, but for that of other persons, very often children or married women. The person for whom property is so held is called the beneficiary of the trust, or, more often by lawyers, *cestui que trust,* or, more briefly, the *cestui.* As might perhaps be expected, the practice of creating trusts is a very ancient one in our legal system. Indeed, it is not possible to determine at what time people in England first began

to do so. When trusts first appeared in English law they were known as *uses,* from the fact that the person in whose hands the property was placed held the same for the use of others and not for himself. The first legal records we have of these uses shows them to be the result of established and well known usage (1). For a long time, however, the courts refused to recognize that the beneficiary, or *cestui que use,* had any rights enforceable in court. In what follows in this chapter, we shall trace briefly the history of these uses and their development into the modern trusts.

§ 2. **Origin of uses.** The reasons which led to the attempts to separate the legal ownership of property from its beneficial use were more than one. Chief among them, probably, was the desire of the ecclesiastical corporations to escape from the results of the statutes of mortmain which forbade the transfer of real estate to corporations as distinguished from natural persons. To evade this, the device was adopted of having a donor, who wished to give the ecclesiastical corporation the benefit of lands, transfer the property to another natural person, the conditions of the transfer being that the transferee should hold the same to the use of the corporation. This evasion of the statutes of mortmain was put an end to by the statute of 15 Richard II (1391), c. 5, but other reasons led to a continuance of the practice of conveying land to the uses of others than the transferee.

§ 3. **Legal recognition of uses.** For a considerable time, as already noted, the cestui que use had no redress

(1) Digby, History of Real Prop. Chap. VI.

in any court, if the transferee to uses failed to perform his agreement by permitting the cestui to have the use of the land. It seems that for a time, probably until forbidden by statute, the ecclesiastical courts undertook to enforce the conscientious obligation under which the feoffee to uses stood. After a time, however, the chancellor, the growth of whose jurisdiction as a court of equity is described at the beginning of the article on Equity Jurisdiction, elsewhere in this volume, and who was undertaking to compel people to do what was equitable and just, began to recognize the duty of the "feoffee to uses" to do as he had agreed. It is very probable that the recognition of the rights of the cestui que use was aided by the fact that the early chancellors were, as we have already seen, ecclesiastics and so more or less acquainted with the Roman or civil law. In that legal system there existed certain legal relationships somewhat similar to the one the chancellor was here asked to recognize. In any event, it is known that as early as the reign of Edward III (1326-77) the practice of conveying land to uses was in very general use.

§ 4. **Fundamental nature of the "beneficial ownership."** The recognition by equity of the rights of the cestui did not in any way affect the legal ownership of the feoffee to uses: "The feoffee to uses is alone recognized by the common law as entitled to the land. It is from him that every alienee who is to take a legal interest must receive his title; he, and he only, is the lord; his treason alone is the cause of forfeiture; for his debts alone can the land be taken in execution. The law knows

nothing of any third person who is free from the burdens while he reaps the profits of the tenancy. Supposing however, that the feoffee attempts to exercise his legal right by alienating or charging the lands, he would, at the time we are now speaking of, be restrained from doing so, by the extra-legal, or, if the expression may be allowed, supra-legal power of the chancellor—a power, as has been seen, stronger than the law. Further, the chancellor having power not only to restrain wrongdoing, but to command the performance of acts, would order the feoffee to do any lawful acts of disposition which cestui que use may require of him. He would be constrained to convey his legal interest to cestui que use or his heir, or to a purchaser from him; to convey to the person named in cestui que use's will; to make the provision required by him for his family; to make a portion for his wife, or for payment of his debts; and to prosecute all actions necessary for the protection of cestui que use's interest'' (2).

In other words, the rights of cestui que use were not an estate in the lands themselves, but only a personal right against the feoffee that he should do his duty by keeping his agreement. This duty the chancellor compelled the feoffee to perform, by ordering him, in the name of the king, to do so, and punishing him for contempt if he failed to obey.

§ 5. **Uses enforced against others than feoffee to uses.** At first the chancellor did not see how anyone except the original feoffee, i. e., the one who promised to do so, could be compelled to allow the cestui to have the benefit of

(2) Digby, Hist. Law of Real Property, Chap. VI.

the lands, and so the heir of the feoffee, or a transferee by conveyance from him, held the land free from the use. Further consideration, however, led later chancellors to see that it was inequitable for an heir of a feoffee to uses, who had paid nothing for his legal title to the land, to keep it for his own use, and so they imposed upon him a similar personal duty to permit the cestui to have the benefit of it. Naturally the same result had to be reached in the case of a donee, to whom the feoffee to uses had made a gift of the land. The same considerations led to the same results in the case of a purchaser for value of the legal interest who took the conveyance of the same from the feoffee with knowledge of the equitable rights of the cestui. In the case, however, of one who, without notice of the equitable rights of cestui que use, purchased for value the legal interest from feoffee to uses, the chancellor saw nothing inequitable in permitting him to enjoy the legal rights of ownership thus innocently acquired, and so refused to impose upon him any duty to hold the property for the former cestui que use. The latter's only remedy in such a case was against the feoffee personally.

§ 6. **Modes of creating uses.** We have already described one of the simplest modes of creating a use, viz., A, legal owner in fee simple, makes a feoffment (conveyance) to B and his heirs (i. e., in fee simple), to the use of C and his heirs. In other cases uses arose which were based upon a presumed intention of the parties to a transfer of land. If A without consideration transferred his land to B and his heirs, the chancellor at this period of

our legal history presumed, since that was usually the case at this time, that the intention was that the use should remain, or result, to A. This presumption was one of fact, and could be rebutted by evidence showing an intention that the use should go to B along with the legal title. The payment of a consideration, or the fact that B was a near blood relative of A, served to rebut the presumption. At this time, in all the cases supposed, the transfer of the legal title to B required the delivery of the possession of the property to the transferee, i. e., "feoffment" with "livery of seisin." See History of Real Property, § 33, in Volume V of this work. Uses could, however, be created without this transfer of possession. If A covenanted to stand seised to the use of B, and B were a sufficiently near blood relative, or a consideration in the shape of money was given for the covenant, the chancellor would compel A to keep his covenant; in other words B became cestui que use. If there were a valuable consideration (money), a promise to stand seised, though not by deed (not under seal), was sufficient to raise a use in favor of the promisee. This form usually appeared as a "bargain and sale," i. e., A, the legal owner, agreed with B, the purchaser, for the sale to the latter of the land, and B paid or promised to pay the money for the land. In such a case, the seller by virtue of the bargain and sale was held by the chancellor to be seised to the use of the bargainee.

§ 7. **Duration and descent of interest of cestui que use.** In determining the duration and devolution of the interest of cestui que use, the chancellor followed the analogy

furnished by legal estates in land. For example, if land were transferred to B and his heirs, to the use of C and his heirs, C would have an "equitable estate in fee simple," just as B had a legal estate in fee simple. Similarly, on the death of cestui que use, the beneficial interest would go to his heirs, if a legal estate of similar duration would, for example in the case of the fee simple given above. On the other hand, if the feoffee were to hold to the use of C for ten years, the rights of C, if he died before the expiration of ten years, would pass to his executor or administrator, just as would a legal estate for years. We should note, however, that equity denied dower to the wife and curtesy to the husband of cestui que use.

§ 8. **Reasons why uses became so common.** It is said that at the time of the Wars of the Roses (1455) the greater part of the land in England was held on feoffments to uses (3). As already pointed out, one of the early purposes which the creators of uses had in mind was the evasion of the statutes of mortmain, put an end to by the statute of 1391 previously cited. Other purposes were the defrauding of creditors, who could levy on the legal interest only, and not on the use. This was ended by a statute of 1376 (4). Still another purpose was to enable one who had wrongfully disseised another of land to prevent the rightful owner from recovering it. This was accomplished by transferring the land to some great feudal lord whom it would be difficult to oust, and

(3) Co. Lit. 272a 11 (1455).
(4) 50 Edw. III, c. 6 (1376).

who would consent to hold it for the disseisor. This also was later prevented by statute (5). Finally, the feoffment to uses aided the tenants of lands to escape many of the results of the feudal system of tenures, such as forfeiture of lands for treason, etc. If the one guilty of treason held only the use, no forfeiture was incurred, as the loyalty was due only from the legal owner, even though the one having the use was in possession and actually enjoying the land.

§ 9. **Purpose of statute of uses.** Owing to the recognition and enforcement of uses by the chancellor, the one for whose use land was held came to enjoy nearly all the benefits of ownership without the corresponding burdens. This being so, cestui que use was not inaptly described as the "beneficial owner" as distinguished from the feoffee to uses, the legal owner. In the latter part of the fifteenth century two statutes made attempts to remedy some of the evils resulting from this separation of legal from beneficial ownership (6), but they had little effect as compared with the great statute of uses of 1536 (7) which had for its object the reunion of the beneficial with the legal ownership. This statute provided that whenever any person stood seised of any interest in lands for the use of other persons, the ones having the use or beneficial interest "shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same," so that the legal estate pre-

(5) 1 Rich. II, c. 9 (1377).
(6) 1 Rich. III, c. 1 (1483); and 4 Hen. VII, c. 17 (1488).
(7) 27 Hen. VIII, c. 10, passed in 1535 and effective in 1536.

viously vested in the persons seised to uses should vest in the ones who were entitled to the use.

§ 10. Effect of statute of uses. Had the statute had its intended effect, the distinction between the legal ownership and the beneficial ownership would have been annihilated. Unfortunately, as is so often the case, the statute not only failed to carry out its purpose, but produced a large number of unforeseen and very important results. In fact, what may be called the "modern law of real property and the highly technical and intricate system of conveyancing which still prevails [in England] dates from the legislation of Henry VIII" (8).

Section 2. Nature of Trusts.

§ 11. Uses not really abolished by statute of uses. As intimated in the preceding subsection, the statute of uses did not have the desired effect. In the first place, it did not apply to personal property. In the second, it applied only where one person stood *seised* for another's use. As the common law did not ascribe seisin to one who held a term of years, it follows that if A, seised in fee of Blackacre, raised a term of years, however long, vesting the same in B, to the use of C and others, the statute did not cover the case, i. e., did not "execute the use" and vest the legal interest in the term of years in C and the others, as would have been the case had A conveyed a freehold interest (a life estate or fee simple, for example) to B. In the third place, by a rather curious bit of scholastic reasoning, it was held that the statute exhausted itself

(8) Digby, Hist. Real Prop., Chap. VII, sec. 1.

in executing one use, and that if there were a "use upon a use," the second was not covered by the statute. Concretely: a conveyance to A to the use of B to the use of C, after the statute, resulted in the legal interest passing to B, and in the use vesting in C (9). In the fourth place, whenever the one in whom the legal estate was vested had any active duties to perform, such as managing the property, collecting the rents and profits, and paying them over to the ones for whose benefit he held the land, the statute again did not apply. Just when the grantee of the legal interest has active duties, and so the title remains in him, it is not always easy to determine. If it be found to be such, however, the distinction remains between the legal title and the beneficial or equitable interest, and this brings us to the modern trust.

§ 12. **Nature of a trust.** The modern trust is in reality nothing but a development of the old use. The cases in which active duties were imposed upon the grantee to uses were not covered by the statute, and the rights of the one for whose use the property was conveyed were still enforceable only in equity by the chancellor's decree bidding the grantee to perform the conscientious obligation which he had undertaken. The active uses came to be called trusts, and it is with them that we have to deal. Many, indeed most, of the old rules as to uses still applied, but to some extent departures were made, due to the attempts of equity more and more to treat the "equitable" or "beneficial ownership" as much like real ownership as possible. For example, it was held, though not

(9) Tyrrell's Case, Dyer, 155a.

without a struggle, that the husband of cestui que trust was entitled to an estate by the curtesy in the equitable interest; but, illogically, dower was refused to the wife of cestui que trust. With these matters of detail, however, we shall deal later. Strictly and in essence, the modern trust is the lineal descendant of the old use, and partakes of the same fundamental characteristics. The trustee owns the property, both at law and in equity, in spite of loose language used at times by the courts which seems to indicate the contrary; and the right of the cestui is, in essence, to have the chancellor, by acting in personam, compel the trustee to perform this conscientious obligation. That this is true will come out more clearly as we proceed with the discussion of the rights of the cestui with reference to the property, as against both trustee and third persons.

CHAPTER II.

CESTUI'S EQUITABLE INTEREST IN TRUST-RES.

Section 1. Cestui's Right to Follow Trust-res.

§ 13. **Rights against heir of trustee.** The property which is held in trust for another is most conveniently described by the term "trust-res," or "res" (Lat. res= thing, property), and we shall so call it from this on. Suppose now that A holds property in trust for B. Upon A's death the title of the property, if the latter be real estate, will, as a matter of law, pass to his heir or heirs; if it be personal property, to his executor or administrator. It is a commonplace of the law of trusts today that in such a case the heir or personal representative, as the case may be, holds the property in trust for the cestui, B. It should be noted, however, that in the early history of equity this was not true, it being at first doubted whether the chancellor could compel anyone except the original "feoffee to uses" to hold the property for the cestui. The reason for thinking that no one else could be bound in the same way that feoffee to uses was, was that the latter was regarded as having entered into an obligation binding upon his conscience and so enforced in equity by decree of the chancellor. Now (it was argued in these early days), the heir (or personal representative, if the

property were personal property) has not bound himself, so what is there to enforce? It is obvious, however, that further consideration, together with the development of higher ethical ideals, would soon compel recognition of the fact that it would not be fair for the heir or personal representative in the case supposed to keep the property for himself. Granted that he has, by operation of the common law, the legal title, and that he never agreed to hold the same for another's benefit, still he gave nothing for it, and his ancestors had in the eyes of a court of equity no right to its beneficial use. This being so, it was inevitable that before long the chancellor should impose upon the heir or personal representative of a deceased trustee a duty to hold the trust-res for the benefit of the same cestui. That equity might impose a conscientious obligation upon one against his will, as well as enforce those willingly assumed, was already being worked out at the same time in other fields of equity, and at least as early as the latter part of the fifteenth century the chancellor had reached the result as to the heir, indicated above.

§ 14. **Rights against transferee of trust-res from trustee.** The early chancellors had the same kind of difficulty in enforcing the trust-obligation against one to whom the trustee had transferred the trust-res. Here again the legal title passed to the trustee, and in the earliest cases equity saw no basis for compelling the transferee to forego his legal rights as owner of the property. For example, it was said in a case in 1453 that "if I enfeoff a man to perform my last will [i. e. in trust to dispose of the

property as directed in my will] and he enfeoffs another, I cannot have a subpoena [i. e. enforce the trust] against the second because he is a stranger, but I shall have a subpoena against my feoffee and recover in damages for the value of the land"(1). But, in 1502, Frowike, C. J., said: "But if the second feoffee has notice of the use, they in chancery will reform this by subpoena at this day" (2). It has accordingly ever since been held that one who, with notice that the res is held in trust, accepts a transfer of the same from the trustee, will be compelled by equity, in spite of his legal ownership, to hold the property in trust for the cestui. Obviously, the basis for the result is the same as in the case of the heir: the transferee, who becomes such with notice that the res is held in trust, cannot conscientiously use for himself the legal rights he acquires by the transfer, and the chancellor accordingly compels him to discharge his duty by holding the res for the original cestui.

§ 15. Rights against donee from trustee. Following the same line of reasoning, one who receives a transfer of the trust-res from the trustee by way of gift is compelled by equity to hold the same in trust for the cestui. If he accepted the transfer, with notice of the fact that he was receiving property held in trust, it is clear that in thus co-operating in a breach of trust he is acting unconscientiously and should be compelled to make restitution to the beneficiary. On the other hand, if he received the gift innocently, i. e., without knowledge of the trust ob-

(1) Fitzherbert's Abridgment, title Subpoena, placitum 10.
(2) Anonymous, Keilwey, 46, 6, pl. 7.

ligation under which his donor stood, it is clear that he commits no wrong, either at law or in equity, by his mere act of accepting the transfer. If, however, after acquiring title to the property, he learns of the trust, it would obviously be inequitable for him to keep the property for his own use, as he paid nothing for it, and so he is compelled by equity to hold it in trust for the beneficiary (3).

§ 16. **Constructive notice.** Under the American system of recording deeds of real estate, the recording of the deed has the same effect as actual notice (knowledge) of its contents. Accordingly, if the trust is disclosed in a deed which has been duly recorded, all persons subsequently acquiring title have what is called "constructive notice" of the trust, which, for the purposes of the rule as to innocent purchase for value, is equivalent to actual notice or knowledge.

§ 17. **Rights against innocent purchaser for value.** Whether one who has obtained the title to the trust-res by purchase from the trustee, paying value for the same and in ignorance that it is held in trust, is subject to the trust or not depends upon the answer to the question: Would it be against equity and good conscience for him to keep it for his own use? We have already noted that one who accepts title innocently, by way of gift, is not regarded by equity as committing any wrong in taking title, and that his only wrong consists in keeping the property after he learned of the trust. That result is based upon the idea that as he has paid nothing for his legal ownership, he

(3) Bonesteel v. Bonesteel, 30 Wis. 516.

ought to be compelled to give up the benefits of it for the benefit of the beneficiary. The purchaser for value, however, has paid value for his legal title and is the owner of the property. How can it be inequitable for him to reap the benefits of his bargain, made innocently and in good faith? Accordingly, it is a fundamental principle of equity and the law of trusts that one who thus acquires the legal title innocently and for value, holds the title to the former trust-res free from any trust obligation. Perhaps the strongest case in the books is Pilcher v. Rawlins (4) in which the defendant, who set up the plea of purchase for value without notice of the trust, could not prove his legal title without relying upon a deed which contained a statement of the trust. This deed, however, had never been seen or heard of by the defendant until after his purchase, and was not recorded. He was held entitled to keep the property discharged from the trust. This rule, protecting innocent purchasers for value, covers the case where the purchaser, who pays the money innocently, has the title transferred by the trustee to a third person for the benefit of the purchaser. In other words, the innocent purchaser for value is protected if he has either the title or the best right to call for it (5).

§ 18. **Purchase with notice from purchaser for value without notice.** A third person who, with notice that the property was once trust property, purchases the same from an innocent purchaser for value, acquires the rights of the latter. The reason for this, is, that, as the prop-

(4) Pilcher v. Rawlins, L. R. 7 Ch. App. 259.
(5) Kenicott v. Supervisors, 16 Wall. 452.

erty in the hands of the innocent purchaser for value is no longer trust property but is owned by the innocent purchaser absolutely free from any trust obligation, there can be nothing inequitable in permitting one who obtains it by transfer from its present absolute owner to succeed to those absolute rights. The mere fact that it was once trust property clearly cannot alter the situation (6).

§ 19. **Re-purchase by trustee from purchaser for value without notice.** The doctrine just stated does not cover the re-purchase of the former trust-res from an innocent purchaser for value by one who, in violation of his duty to cestui que trust, had conveyed away the property. In other words, a delinquent trustee, who, in breach of trust, sells the trust property, cannot re-purchase the same from an innocent purchaser for value and succeed to the latter's rights. This is not because the property, while in the hands of the latter, was held in trust in any sense of the words. A trustee who sells the trust property in breach of trust is guilty of an equitable wrong, and is under a duty to make restitution to his defrauded beneficiary. The details of this equitable duty of restitution will be discussed in another chapter (§§ 83, ff., below). At the very least, it requires him to make good to the beneficiary the loss sustained because of the breach of trust, i. e., to pay the money value of the misappropriated property. If, now, being under a duty to make restitution, he re-purchases the original trust property, clearly he is able to make restitution, not by way of mere money damages, but by specifically devoting the original property

(6) Ely v. Wilcox, 26 Wis. 91.

to the purposes of the trust. In other words, the delinquent trustee must make the best restitution he can, and, when he acquires the property again, that principle requires that he hold it once more subject to the trust (7).

§ 20. **Money paid innocently, but notice received before title acquired.** The doctrine of purchase for value without notice does not protect one, who, without notice of the trust, pays to the trustee the agreed purchase price and then learns of the trust before the conveyance of the title by the trustee. The reason for this is as follows: On paying his money, at most he becomes entitled in equity to a specific performance of the contract between himself and the trustee for the conveyance of the title. The trustee is still the owner of the property, and in equity is already under a prior equitable duty to use the rights of ownership which he has for the benefit of the cestui. The cestui and the purchaser are therefore neither of them owners of the property, but are both claimants in equity against the trustee, each demanding that the owner shall give them the benefit of the property. Under such circumstances equity sees no grounds for preferring one to the other except priority in time, and so awards the preference to the cestui. We see here a typical application of a fundamental equitable principle, viz., when the equities of two or more persons are in all other respects equal, the one which is prior in time prevails (8).

§ 21. **Title acquired innocently, but no part of purchase price paid before notice.** Again, it may happen that the

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(7) Ely v. Wilcox, 26 Wis. 91.
(8) Everts v. Agnes, 4 Wis. 343.

conveyance of the title is made by the trustee to the innocent purchaser in pursuance of the bargain between them, but that after that and before the payment of any portion of the purchase price, the purchaser learns of the existence of the trust. May he go on and complete the same, and, if sued by the cestui, interpose the defence of purchase for value without notice? No, clearly not. At the time he learns of the trust he has parted with nothing, and, although he has acquired the ownership of the trust-res, has paid nothing for it. Clearly, for him to proceed after that to pay the money and seek thus to defeat the rights of the cestui would be an unconscionable thing for him to do, and equity will not permit it. Accordingly, if he does complete the bargain, he does so with his eyes open and will be charged in equity as a trustee of the property (9). It must be noted, however, that the contrary view has been taken in a few jurisdictions (10). The minority view seems clearly unsound, and is contrary to the English authorities which furnish the basis for our law of trusts (11).

§ 22. **Title acquired innocently, but only part of price paid before notice.** The courts in the different jurisdictions are not agreed as to the case where the purchaser, who has acquired title to the trust-res without notice, has paid part and only part of the purchase price before he learns of the trust. By a majority of the courts it is held that in such a case the purchaser must surrender the legal title thus acquired, but only upon being reimbursed by the

(9) Wells v. Morrow, 38 Ala. 125.
(10) Gibler v. Trimble, 14 Ohio, 323.
(11) Baillie v. McKewan, 35 Beav. 177.

cestui for what he has paid before notice (12). The view sustained by a minority of the courts is that the purchaser under such circumstances may retain the property, subject to an equitable lien for the amount of the unpaid purchase money in favor of the cestui (13). On principle the latter view seems more satisfactory. It may be argued that either the purchaser is an innocent purchaser for value or he is not. If he is, the legal title is his unencumbered with any equitable claims against him with reference to it. If he is not, then the cestui is entitled to get the property without paying anything. Let us see. Compare the results reached by the courts in these cases with that in a slightly different class of cases. Suppose the trust-res to be worth $10,000. The purchaser agrees to buy it of the trustee for $3,000 and pays that amount, securing a conveyance. If he bought in good faith and without notice, he may keep the property free from any trust obligation, even though the price paid was grossly inadequate. In such a case, of course, the gross inadequacy of the price would be a suspicious circumstance, and would lead the chancellor to inspect the transaction most carefully in order to be certain that the purchaser actually did buy in good faith and without notice. This latter fact once established, however, the result stated clearly follows.

§ 23. **Same: Comment on conflicting views.** Modify the above case as follows: Trust-res worth $10,000; pay-

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(12) Kitteridge v. Chapman, 36 Iowa, 348.

(13) Hardin's Executors v. Harrington, 11 Bush. (Ky.) 367.

ment of $3,000 down, balance to be paid in future; and conveyance made by trustee—all before notice. According to the first and majority holding, the buyer, since he has paid only part, must surrender the property on being reimbursed for his outlay, although if he had paid only $3,000 and had not agreed to pay any more, he could have kept the property. According to the other, the minority holding, the purchaser could keep the property, but the cestui would have an equitable claim or lien against the property for $7,000. At first sight the principle upon which this latter result is reached does not seem obvious, as the buyer would have held the land entirely free from any equitable claims against it if he had agreed to pay and had paid the grossly inadequate price of $3,000. However, the situation is not simple. In England and in a majority of the jurisdictions in America, a seller who has conveyed real estate upon credit is entitled in equity to a lien for the unpaid purchase-money upon the property transferred. In our case of the sale for $10,000, $3,000 being paid on conveyance and $7,000 remaining unpaid, the seller, the trustee, would be entitled against the buyer to an equitable lien for the unpaid $7,000. The seller, however, being guilty of a breach of trust, the cestui may intervene, and, while the buyer may interpose the plea of purchase for value without notice, the cestui may well be subrogated in equity to the rights of his trustee, i. e., to the equitable lien for the unpaid purchase money. From this point of view, then, the minority view seems to be the one which is most nearly in accord with sound principles.

Section 2. Ownership of Trust-res.

§ 24. **Legal title in trustee.** From the very beginning of our discussion the fact that at law the trustee is the sole and exclusive owner of the trust-res has appeared. Let us now examine some of the cases which demonstrate that this is true of the modern trust as well as of the old use. If our statement be correct, it follows that the trustee is entitled at any time in a court of law to eject the cestui from the trust property, if the latter happen to be in possession. (We shall see later that in many cases equity permitted cestui que trust of property to have possession of the same.) This was what actually happened in Weakly v. Rogers (15), decided in 1789. The same result was reached in Lombard v. Cowham (16). The cestui, if entitled in equity to the possession of the property, is entitled to obtain from the chancellor an injunction ordering the trustee to refrain from proceeding to enforce his legal rights. In many states today, under the modern or code procedure, the same court enforces both legal and equitable rights, but, according to the view which prevails in most states having this new system of procedure, the right of the cestui to remain in possession must still be asserted as an equitable and not as a legal right; a thing which has most important effects upon the manner in which the cestui pleads his right in order to defeat the trustee's action (16).

§ 25. **Trustee may sue third person for wrongful interference with trust-res.** Since the title to the property is

(15) 5 East, 138, note (a).
(16) 34 Wis. 486.

vested in the trustee, it follows that for all legal wrongs done to the property by third parties, the trustee is the one to bring suit. He is therefore the proper plaintiff in actions to recover possession of the property or damages for wrongful interference with it (17). For example, in the first of the cases just cited, the trustee succeeded in an action of trespass against third persons interfering with the property.

§ 26. **Trustee may sue cestui for converting trust-res.** Not only may the trustee, as a common law proposition, turn the cestui out of possession, but he may treat the latter as a tort-feasor and recover damages from him as from any other person tortiously dealing with the property (18). Here again the only relief for the cestui is by a bill in equity to prevent the trustee from enforcing his legal rights, or, under the reformed or code procedure, he may plead his equitable rights as a so-called "equitable defence," which really amounts to the same thing.

§ 27. **Cestui cannot sue third party for tortious dealing with trust property.** If a third person, having no interest in the trust property, wrongfully interferes with the same, the cestui as such cannot bring an action against the wrong-doer. For example, in Richardson v. Means (19) the plaintiff sought to recover possession of a female slave which was in the possession of the defendant. On the plaintiff's own showing, she was the beneficiary of a trust, the title to the slave being vested in the trustee who

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(17) Wooderman v. Baldock, 8 Taunt. 676; State v. Easton Co., 36 N. J. L. 181; Hexter v. Schneider, 14 Oregon, 184.

(18) Guphill v. Isbell, 8 Rich. (S. C. Law) 403.

(19) Richardson v. Means, 22 Mo. 495.

was not a party to the suit. The court held that plaintiff could not recover. The action here was of course a legal action in the nature of replevin, for the recovery of the possession of a specific chattel. So also, in Bailey v. New England Life Insurance Co. (20) a beneficiary, for whom a right of action upon a contract of life insurance was held in trust, was held not entitled to recover in an action brought directly against the insurance company, on the ground that the title to the contract-right was vested in the trustees who therefore were the only ones who had a right to sue upon it.

§ 28. **Cestui's equitable interest not ownership even in equity.** The cestui is often spoken of as "owning the property in equity," or as having the "equitable" title to the same as distinguished from the legal title or ownership. As a useful figure of speech this is all well enough, but it is likely to be misleading if accepted literally. If the ownership in equity be solely vested in the cestui, it would seem to follow that he ought to be permitted by equity to bring actions in equity directly against third persons wrongfully interfering with the trust-res, but that is not the case. By filing a bill in equity against such wrong-doers, the cestui obtains no better treatment than by bringing an action at law. For example, in Colburn v. Broughton (21), the cestui brought an action in equity against a third person who had wrongfully disposed of the trust-res, which in this case happened to be personal property. Relief in equity was denied the cestui

(20) Bailey v. New England Life Ins. Co., 114 Mass. 177.
(21) 9 Ala. 351.

by the court, which held, in effect, that it was not true that in equity the cestui owned the trust-res. Again, in Morgan v. Kansas Pacific Railway Co. (22) the bill in equity was filed by a large number of cestuis for whom certain railway bonds were held in trust, the trustees not being made parties. The suit was against the company liable on the bonds and asked for an accounting and payment. The court held that, merely as cestuis, the plaintiffs had no standing in court, and that the trustees were not only proper but necessary and indispensable parties to the proceeding, unless certain conditions, of which we shall treat later, existed. There being no allegations showing these exceptional conditions to exist, the bill was accordingly dismissed. The English courts have always taken the same view (23).

§ 29. **Trustee owns trust-res even in equity.** Carrying out the idea that the ownership of the trust-res, even in equity, is not vested in the cestui but in the trustee, the courts of equity hold that even in equitable suits brought by the trustee against third persons for wrongs connected with the trust-res, the cestui is not a necessary or indispensable party, though of course he may properly be joined if the trustee so wishes. Take for example the case of Carey v. Brown (24), where the trustee who held certain promissory notes in trust for others had filed a bill in the Federal court of equity. The defendants objected to the bill, on the ground that the persons entitled to the equitable interest should have been made parties,

(22) 15 Fed. 55.
(23) Re Uruguay, 11 Ch. Div. 372.
(24) 92 U. S. 171.

but the objection was not allowed. The court said: "Where the suit is brought by the trustee to recover the trust property, or reduce it to possession, and in no wise affects his relation to his cestui, it is unnecessary to make the latter parties."

§ 30. Right of delinquent trustee to repent and recover trust-res. So far has this conception of the trust been carried, that a trustee, who in breach of trust has conveyed away the trust-res to anyone except an innocent purchaser for value, is permitted by equity to repent of his sins and obtain in equity a re-conveyance of the property upon a bill in equity filed for that purpose (25). Of course in a case of this kind, the trustee no longer has the legal title, as he has conveyed it to his fellow-sinner; but equity permits the delinquent trustee to bring the equitable action in order to put himself into a position to undo the harm he has caused the cestui.

§ 31. Ordinarily trustee the only necessary defendant in suits by third persons. Following the principles established in these other cases, a third party who brings suit in equity to deprive the trustee of the trust-res need not join the cestuis as co-defendants (26). The same result is reached on a bill for specific performance brought against the trustee (27), or to redeem property from a mortgage held by the trustee (28). In all these cases the trustee, as owner of the property, is considered as repre-

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(25) Wetmore v. Porter, 92 N. Y. 76.
(26) Kerrison v. Stewart, 93 U. S. 155.
(27) Van Doren v. Robinson, 16 N. J. Eq. 256.
(28) Sweet v. Parker, 22 N. J. Eq. 453.

senting sufficiently the interests of the persons for whom he holds the property in trust.

§ 32. **Same: Exceptional cases.** Purely on grounds of policy, and not because of any departure from the theory underlying the preceding cases, equity requires in some cases the joinder of the cestuis as parties to the litigation in equity between the trustee and third persons. For example, it has been held by some, though not by all courts, that in a bill to foreclose a mortgage upon the trust-res, the cestuis should be made co-defendants with the trustee, in order that they may be given an opportunity to raise the money necessary to redeem the property from foreclosure (29). Even in this case, as suggested, many courts do not require the cestuis to be made parties to the suit, as they believe the trustee adequately represents the interests of his cestuis (30).

§ 33. **Real nature of equitable interest.** From the foregoing, the real nature of the interest of the cestui in the trust-res must be apparent. Although not the owner of the trust-res, he is interested in it, and that interest is based upon the personal duty which the owner of the trust-res owes the cestui to use the property for his benefit. In other words, a trust exists wherever one person, not the owner of a thing, has a personal claim against another person who does own it, that the latter shall use the thing in question for the benefit of the former. Starting with this conception, practically all the important rules in the law of trusts may be deduced by no very com-

(29) Francis v. Harrison, 43 Ch. D. 183.
(30) Van Vechten v. Terry, 2 Johns. Ch. 197.

plex process of reasoning. We have seen that a person may be under a duty to use a thing which he owns for the benefit of another because he has so agreed. In that case we have what is called an express trust. In other cases we saw that equity imposed a duty, often against the owner's will, to use the thing for the benefit of another, for example, where a purchaser of the trust-res who took with notice, is held as trustee for the cestui. Trusts which arise in this manner are constructive trusts, the trust obligation being imposed or "constructed" by the chancellor upon principles of natural equity and justice. Fundamentally, all trust obligations arise in one of these two ways, but of the details of the classification of trusts we shall deal later on (§§ 57-60).

§ 34. **Claim of cestui is purely equitable.** From the brief sketch of the history of uses and trusts given above, it is apparent that the interest of the cestui is purely the creation of the court of equity as distinguished from the court of law. Not only is this true, but no action for damages for breach of trust or breach of trust agreement will lie in a common law court against a delinquent trustee (31). This is true even in the case of the express trust, in many of which cases apparently all the elements of a simple contract are to be found, including promise, consideration, and intention to enter into a binding obligation. This result is an illustration of the effect of historical development upon the logical symmetry of our legal system. At the time the feoffment to uses described in our first chapter was first used, and indeed all dur-

(31) Norton v. Ray, 139 Mass. 230.

ing the time when uses as distinguished from trusts existed, (i. e., before the statute of uses) no action for the enforcement of simple contracts had been devised. Before the action for the enforcement of simple contracts was finally developed under the name of special assumpsit, equity had occupied the field of trusts, so that when simple contracts were recognized by the common law, the contract idea was never applied to express trusts, but they were left in the hands of the chancellor. However, through the development of the action of general assumpsit and its extension into the really equitable field of quasi-contracts, it finally became possible for the cestui to bring an action at law against his trustee, when the only thing left for the trustee to do was to pay over to the cestui a definite sum of money. This was of course always the case where the trustee had stated an account to the cestui, thus fixing the amount due (32), but the courts, at least in America, went beyond that and extended the rule to cover all cases where the amount due was definite and certain (33).

§ 35. **Trust may be enforced though trust-res out of jurisdiction.** Inasmuch as the right of the cestui with reference to the trust-res is not based upon ownership of the property, but upon the personal claim which he has over against the trustee, it follows that if the chancellor has both cestui and trustee before him, he may proceed to enforce the trust, i. e., give effect to the equitable interest of the cestui, even though the trust-res be itself

(32) Davis v. Coburn, 128 Mass. 377.
(33) Buttrick v. King, 7 Metcalf (Mass.) 20.

beyond the jurisdiction of the court (34). Of course this result is simply an illustration of the fact that equity acts upon the person by ordering people to perform their duties, rather than in rem (upon the ownership of property). On the other hand, in the absence of statutes, equity is powerless to administer adequate relief even though the res be within the jurisdiction, if the trustee be absent therefrom. The legal title is in the trustee, and, so far as equity is concerned, there it must remain, until the trustee can be brought under the jurisdiction of the court. This situation has, however, been remedied in many perhaps most jurisdictions by statutes authorizing the court of equity to appoint a new trustee in such cases, the statute providing that upon his appointment the legal title shall pass to the new trustee. In pursuance of a statute of this kind, the court, in Felch v. Hooper (35), where the defendant trustee had absented himself from the state, proceeded to appoint a person to carry out the trust. It should be carefully noted that in the absence of such statutes, the removal by equity of a delinquent trustee and the appointment of a new one in his place left the legal title outstanding in the old trustee, until, in pursuance of an order of the court, the latter conveyed the title to the court's appointee.

§ 36. **Rights of cestui where trustee refuses to perform duty.** We have seen above (36) that the cestui is not entitled to sue third parties who wrongfully interfere with the trust-res, but that the trustee is the one to do this,

(34) Baker v. Rockabrand, 118 Ill. 365.
(35) 119 Mass. 52.
(36) §§ 27-29, above.

both at law and in equity. This being so, what happens if the trustee refuses to bring the appropriate action? In such a case the remedy for the cestui is to file a bill in equity against the delinquent trustee, the object of which is to compel the latter to perform his duty by suing the third person. This right of the cestui has been recognized from very early times, but for many years this was all that the cestui could do. Today, however, he may join the third party as defendant with the delinquent trustee. This is based upon the equitable principle of avoiding a multiplicity of suits. Under the old system, the cestui first brought the equitable action against the trustee, and then the latter brought the other action, legal or equitable as the case may be, against the third person. To save time and expense to all parties, the modern simple method was introduced, but the underlying principle remains unchanged. Two suits are consolidated into one, but the cestui has no rights directly against the third person under the new system any more than under the old (37).

§ 37. **Rights of cestui in possession of property.** We must guard ourselves very closely against one error. Although as we have seen, the cestui as such is not the owner of the property, it may happen that in a given case he is in possession of the property. In fact this is often the only way in which the objects of the trust can properly be carried out. Now the common law attaches very important results to the possession of property. It is often said that possession is prima facie evidence of title, but even that is not strong enough. It may fairly be said

(37) Wright v. Mack, 95 Ind. 332.

that, as against all the world but the rightful owner, the one in possession of property is, by the common law, the owner of it. By that is meant that if anyone interferes with it, the possessor may bring not only those common law actions intended specifically for the redress of injuries to mere possesion, but also all the actions based upon ownership. Whatever action an absolute owner could bring under like circumstances, the possessor of property can bring (38). This being so, there is no reason why cestui que trust in possession may not rely upon this doctrine. Even so, it must be remembered that he sues not as cestui que trust but as possessor, and so owner against all but the rightful owner, who in this case is the trustee. As we have seen, his only remedy against the trustee is by bill in equity, if, in the given case he is, by the terms of trust entitled to remain in possession.

§ 38. **Statute of limitations.** From the fact that the trustee and not the cestui is the one to sue third persons in all matters relating to the trust-res, it follows, that, if the statute of limitations has run against the trustee, upon any claim of any kind, whether legal or equitable, the cestui is also barred by the statute. This is true whether the cestui be an infant, a married woman, or an adult (39). Conversely, if the trustee be an infant, the statute of limitations will not run against the cestui, irrespective of whether the latter is an adult or not. In other words, the only owner of the claim is the trustee, and so the time

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(38) Jeffries v. Great Western Railway Co., 5 E. & B. 802; The Winkfield [1902] Probate, 42.

(39) Wych v. East India Co., 3 P. Wms. 309; Meeks v. Olpherts, 100 U. S. 564.

of the running of the statute is computed on that basis.

§ 39. **Cestui not entitled to vote as owner of res.** It is evident that where the trust-res consists of shares of stock in an incorporated company, the one entitled to vote upon the shares is the trustee, in whom the ownership is vested (40). It follows of course that the cestui is not entitled to vote on the shares so held. Of course if in a given case the trustee is threatening to vote in a manner inconsistent with his duties as trustee, as where, by acting against the interests of the cestui, he would cause irreparable damage to the latter, equity would, on the application of the cestui, restrain the trustee from so voting (41).

§ 40. **Burdens of ownership fall upon trustee.** In determining the validity of assessments for taxes, if they depend upon the residence of the one owning the property subject to taxation, as is usually the case in taxes upon personal property, it is the residence of the trustee and not of the cestui which settles the matter. This is, of course, because the trustee and not the cestui owns the trust-res (42). Similarly, actions for damages for nuisances created upon the trust-property, where it is real estate, are properly brought against the trustee and not against the cestui. For example, in Schwab v. Cleveland (43) the action was brought against the trustee for injuries done to the plaintiff by the escape of water from a leader upon the house held by the defendant as trustee

(40) In re Barker, 6 Wend. 509.
(41) McHenry v. Jewett, 90 N. Y. 58.
(42) Latrobe v. Mayor of Baltimore, 19 Md. 13.
(43) 28 Hun, 458.

for others. In deciding that the action lay against the trustee, the court said: "There is no force in the objection that he cannot be made liable as trustee. He owns as trustee, and owes the duty as owner to keep his pipes and drains from injuring his neighbor by reason of faulty construction or from being suffered to get in bad repair." As pointed out in this case, whether the trustee can in such a case re-imburse himself from the trust-estate is a totally different question, with the solution of which the third party is not concerned. We shall find the answer to this when we come to discuss more specifically the duties and liabilities of trustees to their cestuis. Here again also we should note that a cestui in possession of premises held in trust for him, may incur a liability to third persons, whenever, as is sometimes the case, the common law liability is based upon the duty of an occupier of land or buildings to do certain things to protect other persons from being injured by the unsafe condition of the premises.

CHAPTER III.

CREATION OF EXPRESS TRUSTS.

§ 41. Kinds of trusts. It has previously been pointed out (§§ 4-5, 13-14) that as regards the manner of their creation, trusts are of two kinds: (1) those which arise because of an expressed intention that they shall do so; (2) those in which the trust obligation is imposed by equity upon the owner of the property, upon certain principles of natural justice and equity. The treatment of the second class we shall reserve for the next chapter, confining our attention in this chapter to those of the first class. In connection with this first group, we shall have occasion to notice that they may arise, like the old uses before the statute of uses, either where property is conveyed by its owner to one person in trust for others, or where the owner retains the title in himself but declares himself trustee for others. In both, however, the obligation to hold the property in trust clearly is based upon the expressed intention. This being so, let us first of all examine the cases in which the intention is expressed in words.

§ 42. The meaning of language ordinarily a question of fact. It is not possible in the space at our disposal to treat in detail the cases in which the courts have had to interpret language used in order to find out whether a trust

obligation was intended or not. We shall have to content ourselves with setting forth certain fundamental principles connected therewith. To begin with, the question of the meaning of words is ordinarily a question of fact. This is true, whether the language be written or oral. In certain cases however, our legal system has established certain rules, which say that when certain words are used they shall always mean the same thing, and whenever that is so, the meaning of the words in question is determined by a rule of law, and so becomes a question of law and not of fact. In such cases, it is usual to speak, not of the meaning, but of the legal effect, of the words in question. For example, in the law of real property, if a deed says that property is transferred to A for his life, and after his death to the heirs of A, a rule of law, known as the rule in Shelley's case, settles that the legal meaning, or legal effect, of those words is to transfer to A the whole interest, the fee simple, in the land; the heirs of A taking nothing from the deed itself, but only by descent from their ancestor, if he does not dispose of the property before or at his death.

§ 43. **Language necessary to the creation of a trust.** Ordinarily, especially in the case of trusts created by will, the language which the court is called upon to interpret has no fixed or definite legal meaning, and so the question for the chancellor is a question of fact: "What does the language in this instrument mean?" To create a trust, it is not necessary that the word trust be used, but if the language, fairly interpreted, means that the one to whom the property is transferred, or who is alleged to

have made a declaration of trust, is to be legally bound to use it for the benefit of others, a trust arises. If, on the other hand, no such intention can be found, but only an expression of a wish or hope or desire that the property shall be so used, without any binding obligation being intended, no trust will be created. In view of the various phrases which can be and have been used, all susceptible of different constructions, it is clear that in many cases all the chancellor can do is to make the best guess he can at what was intended, much of course depending upon the context.

§ 44. **Same: Illustrations.** In some cases the meaning is reasonably clear: For example, in Davis v. Mailey (1), property was left by will to the wife of the testator, "to her sole use, benefit, and disposal . . .; and whatever may be left of my estate, if any, she may by will or otherwise give to those of my heirs that she may think best, she knowing my mind upon that subject. I am willing to leave the matter entirely with her, feeling satisfied that she will do as I have requested her to in the matter." The court felt clear that the testator intended to express only a wish or request, morally binding, perhaps, but with no intention to bind the wife legally in any way. On the other hand, in a case in which very similar language was used, the court reached the conclusion that a binding obligation to carry out the intention of the testator was fairly contained in the language (2). In this case the language was: "In the utmost confidence

(1) Davis v. Mailey, 134 Mass. 588.
(2) Harrison v. Harrison, 2 Grat. 1 (Va.).

in my wife, I leave to her all my wordly goods, to sell or keep for distribution amongst our dear children, as she may think proper. My whole estate, real and personal, is left in fee simple to her, only requesting her to make an equal distribution amongst our heirs." Clearly here the language is open to either construction, and the court as umpire has to render the final decision. One more case will clearly bring out the actual state of affairs. In Sears v. Cunningham (3), the testator devised all his property to his wife, "in her own name and for her own purposes, with only this condition . . . that I wish, at the death of my wife, she should make an equal division of her estate to such children as survive her." This, the court held, created no trust. Obviously, an equally rational court might reach the contrary result in either of the last two cases without doing any violence to the language used.

§ 45. **Necessity for consideration.** In the law of contracts, in order to make a promise legally binding there must be a consideration for it, unless the promise be under seal. Equity also refuses to decree specific performance of promises, whether under seal or not, unless they be made for a consideration. See the article on Contracts (§§ 40, ff.), in Volume I, and that on Equity (§ 24), elsewhere in this volume. Suppose one owning property declares himself trustee for one or more other persons, and does so voluntarily, i. e., without receiving any consideration therefor. Is the result to create a valid trust, or does equity refuse to compel the one making the decla-

(3) Sears v. Cunningham, 122 Mass. 538.

ration to abide by it? When we bear in mind that a valid declaration of a trust does not result in divesting the one making it of the title to the property, or any portion thereof, but simply gives rise to a personal claim against him, enforceable in equity, that he shall use the property he owns for the benefit of the beneficiaries of the trust, it seems clear on principle that the chancellor ought to refuse to recognize the validity of such a declaration, unless it be made for a consideration. To do otherwise is to enforce specifically a personal obligation voluntarily undertaken—one not supported by a consideration. Nevertheless, from the time of a famous decision of Lord Eldon in 1811 (4), equity has enforced a declaration of trust, though no consideration was given for it. Lord Eldon reached his decision by making a mistake which it is very easy to make, viz., treating a figure of speech as representing a reality. He seems to have thought of the equitable interest as constituting real ownership, his idea seeming to be that one who owned property absolutely, had two titles, a legal and an equitable title. The declaration of trust, then, appeared to him, if we may judge from his language in that case, as a transfer of the equitable title to the proposed beneficiary, the one making the declaration retaining the legal title. He says: "It is clear that this court will not assist a volunteer; yet, if the act is completed, though voluntary, the court will act upon it. It has been decided that, upon an agreement to transfer stock, this court will not interpose; but if the party had declared himself to the trustee of that stock, it be-

(4) Ex parte Pye, 18 Ves. 140.

comes the property of the cestui que trust without more; and the court will act upon it." Whatever may be the true view on principle, the validity of gratuitous declarations of trusts is almost universally recognized today.

§ 46. **Consideration in trusts created by transfer of property.** Wherever the trust arises by the transfer, either by will or deed, of the legal title to a new owner, on his agreement to use it for the benefit of others (in trust for others), it is clear no consideration other than the transfer of the property to the proposed trustee is necessary. He certainly could not be allowed to keep the property thus acquired for his own benefit, and the fact that he derives no benefit, but on the contrary assumes a burden, should not stand in the way of enforcing his agreement. In fact, as we have seen (Chapter I), the first "uses" were based upon just this sort of transaction, and were enforced by the chancellor on the ground that it was not conscientious for the new owner to keep the property for his own use.

§ 47. **Invalid gift not a declaration of trust.** The importance of distinguishing most carefully between the two methods of creating trusts, i. e., by declaration and by transfer to another, comes out most clearly in cases where the owner of property attempts to transfer it to another, and, because perhaps of some failure to comply with all the formalities required by law for the transfer of title, fails to accomplish his purpose. In such a case the intended gift must, as a common law proposition, fail. If, however, we should argue as did Lord Eldon in the Pye case (§45, above), we might say that though the legal

title did not pass, the equitable title in such a case did, as no formalities are required for that. (We are ignoring for the moment the requirements of the statute of frauds, which will be discussed separately, later). This seems to have been the view of Sir John Romilly in Morgan v. Malleson (5), in which he held that, although the legal title to certain bonds did not pass, the ineffective gift amounted to a valid declaration of trust. This view however, has been repudiated in subsequent cases (6) and does not represent the law.

§ 48. **Same: Reasons.** The best statement of the reason for refusing to treat such a transaction as a declaration of trust is that given by Sir George Jessel in the case last cited. He said:

"The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true

(5) L. R. 10 Eq. 475.
(6) Richards v. Delbridge, L. R. 18 Eq. 11.

he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. The true distinction appears to be plain, and beyond dispute; for a man to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise."

§ 48a. **Notice to cestui.** In discussing the question of the necessity for notice to the proposed cestui in order to complete the creation of a trust, we must once again divide our cases into the same two classes. If the trust is to be created by transferring the property to a new owner in trust for one or more other persons, no notice is necessary, and the trust is valid and irrevocable although the fact of its creation be absolutely unknown to the cestui (7). On the other hand, in dealing with declarations of trust, some of the courts have fallen into confusion. Some hold that notice to the cestui is necessary (8). Others hold that this is not necessary, any more than in the case of trusts created by the transfer of title to another in trust for the proposed cestui (9). Much of the confusion has arisen from a failure to notice that in many cases no real declaration of trust was intended.

(7) Van Cott v. Prentice, 104 N. Y. 45.
(8) Clark v. Clark, 108 Mass. 522.
(9) Martin v. Funk, 75 N. Y. 134.

For example, in order to evade the rule of the savings banks limiting deposits to a certain amount, depositors have not infrequently, when they had reached the limit with one deposit, opened an account ostensibly as trustee for some child or other relative. On its face, this looks like a trust, but the surrounding circumstances often show no intention on the part of the depositor to confer any claim, legal or equitable, upon the supposed cestui, but on the contrary, only an intention to evade the rule of the bank above referred to. If this be the case, then no trust is intended, and none can arise, and the fact that the deposit remains until the death of the depositor cannot alter the situation. Some courts, however, have decided that upon the death of the depositor the "tentative trust" becomes "irrevocable," a compromise result not intelligible on any principle (10) According to all sound principles and the overwhelming weight of authority, a trust once created is irrevocable (11).

§ 49. **Subject matter of trust.** In order that there be a trust created, it is necessary that the property or thing to be held in trust be set apart or identified in some way. All through our discussion down to this point we have assumed this to be true, and indeed any other view is impossible. If one has an "equitable interest," it must be an interest in something. He must have a personal claim against his alleged trustee that the latter shall devote to his use some definite thing or res recognized by the law as capable of being owned. A failure to keep this

(10) Matter of Totten, 179, N. Y. 112.
(11) McDonald v. Starkey, 42 Ill. 442.

in mind has, however, led very eminent judges astray in certain cases which we shall discuss in a moment. Of course the thing held in trust is very often tangible property, real or personal, but it is not at all necessary that this be so. Anything which would constitute assets in the hands of an administrator of an estate on one's death is a definite thing or res capable of being held in trust, even though it be only an intangible claim against some one. For example, if some one owes me $100, I may hold the claim I have against him in trust for some one else. My claim as creditor is regarded by the law as being owned by me; my administrator would have to list it as part of the assets of my estate; I may transfer my right to collect it to another. All these things show that in such a case I have something definite, viz., my right against my debtor, that I own and can therefore hold for the use and benefit of another.

§ 50. **Debtor cannot hold debt in trust.** We must, however, beware of turning this proposition around. Although a creditor may hold his claim against his debtor in trust for some one else, the debtor as such cannot hold the debt in trust for the creditor. In fact, we are talking nonsense when we state any such proposition. The debtor has not the debt; the creditor is the owner of that. Nor has the debtor, as such, anything which belongs to the creditor. If A loan B $100, the title to the money vests in B, and he is entitled, according to the exact terms of the bargain, to use the money for any purposes he pleases, returning only an equivalent sum. Of money belonging to the creditor, he has none. As already

suggested, a failure to note this carefully has led to astonishing decisions by some courts. For example, in M'Fadden v. Jenkyns (12) Warry lent Jenkyns £500. Warry, the creditor, sent word to Jenkyns to hold "the money" . . . "upon trust for Mrs. M'Fadden, to be at her absolute disposal, for her own use and benefit." Jenkyns agreed to do so. The chancellor, Lord Lyndhurst, held that this transaction created a valid trust in favor of Mrs. M'Fadden, saying that it "impressed a trust upon the money which was complete and irrevocable." It may well be asked, what money did Jenkyns hold in trust? Warry might hold his claim against Jenkyns in trust for Mrs. M'Fadden (13), or, conceivably, Jenkyns might set apart as the trust-res, some specific £500 which he had, but this was not done. So far as appeared, we do not know whether Jenkyns had that much, or indeed any, money at the time of the origin of the supposed trust. Precisely the opposite result was reached in another case (14).

§ 51. Novation distinguished from creation of trust. In cases like that of M'Fadden v. Jenkyns just cited, what really happens is that, by what is known as novation, a new creditor is substituted for the old. If, for example, A has a claim for $100 against B, and A, B, and C all agree that A's claim against B shall be extinguished and there shall take its place a new claim for the same amount in favor of C, A drops out as creditor and C steps into his place. That seems to be what really happened

(12) M'Fadden v. Jenkyns, 1 Phillips, 153.
(13) Vanderberg v. Palmer, 4 K. and J. 204.
(14) In re Caplen's Estate, 45 L. J. N. S. 480.

in M'Fadden v. Jenkyns. The vital difference is, that, if Jenkyns becomes a trustee for Mrs. M'Fadden, say by setting apart specific money as a trust-res, the cestui will become entitled in equity to the specific thing thus set apart, while, if there be nothing but a novation, Mrs. M'Fadden has only a claim for a sum of money, but no right attaching to any specific thing.

§ 52. **Equitable interests may be held in trust.** We have seen that equity recognizes that the trust-res need not be a tangible thing, but may consist of a claim or "chose in action." Suppose one having an equitable interest in property declares himself trustee of the same for one or more other persons. It would seem that since equity recognizes a mere common law debt (which is only a personal right to get a sum of money) as a res which can be held in trust, it ought also to recognize that its own creature, the equitable interest (this personal claim enforceable in equity, that a specific res be used for the benefit of the cestui) may itself be held by the latter under another personal duty to use it for the benefit of others. While not common, especially in this country, such trusts are not unknown and are recognized as valid. The case of Sloan v. Cadogan (15), is one of the best examples of this to be found in the books. Cadogan being entitled to an equitable interest in one fourth share of a fund of money, assigned this equitable interest to four trustees, upon certain trusts connected with his marriage to the plaintiff. The validity of this transaction was as-

(15) Sloan v. Cadogan, Sugden. 3 Vend. & Purch. (10th ed.) appendix 66.

sumed by all the parties to the litigation, the only question being as to the legal effect of some of the language used, a matter that does not concern us here.

§ 53. **Statute of frauds.** By the English statute of frauds (16) all declarations or creations of trusts of real estate "shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts, or by his last will in writing, or else they shall be utterly void and of none effect." The statute however, farther excepts from the operation of its provisions all trusts "which shall or may arise or result by the implication or construction of law." In addition, all grants or assignments (transfers) of trusts are required to be in writing. Similar legislation has been enacted in this country, many states following substantially the wording of the English statute, others modifying it by requiring a deed or conveyance instead of a mere writing signed by the party. In a few states no statute has been enacted, and in these an oral trust of land would apparently be valid and enforceable. By its terms, the statute does not apply to anything except express trusts of real property. What are known as resulting and constructive trusts are, as stated, expressly excepted from its operation. These trusts and the relation of the statute to them will be discussed in the next chapter. Also, it should be noted, an oral trust of personal property is valid and enforceable, as the statute includes only real property within its provisions.

§ 54. **Subsequent writing.** Whatever be the language

(16) 29 Charles II (1677), c. 3, secs. 7, 8, and 9.

of the statute, whether it says that the trust shall be "manifested and proved," or that it must be "created or declared," or "created and declared," by the writing ordered, it is almost universally held that the oral declaration of a trust creates a trust, which, however, is unenforceable until the writing or deed comes into existence. The result is that a subsequent writing or deed is sufficient, and, when such a writing comes into existence, the trust becomes enforceable, and dates from the time of the oral declaration. If the statute follows the language of the English statute, almost any kind of a writing which contains the terms of the trust and is signed by the proper person will be sufficient, e. g., a letter or receipt (17). The subsequent writing operates simply as an admission of the existence of the trust already created, and so the purpose or intention of the one signing the paper is not material (18). It is even held that a defendant in a suit in equity based upon an oral trust, who admits the trust in his answer without relying upon the statute, has thereby lost the benefit of the statute, if the pleadings disclose the terms of the trust (19), although if he relies upon the defense of the statute he may escape from the operation of this rule.

§ 55. **Contents and signature of writing.** The writing or deed must of course contain the terms of the trust. It is not necessary however, that all the terms be contained within the four corners or one piece of paper. If the pieces are physically connected or one refers to the

(17) Urann v. Coates, 109 Mass. 581.
(18) Bates v. Hurd, 65 Me. 180.
(19) McLaurie v. Partlow, 53 Ill. 340.

other, it is sufficient (20). Connection between two separate papers has even been permitted to be established by parol evidence in one or two relatively recent cases (21). Where only a writing is required and not a deed, usually the writing need only be signed and not necessarily subscribed (22), but in some states the statute expressly requires that the writing be subscribed, i. e., signed at the end.

§ 56. **Effect of statute.** The meaning of the statement that an oral declaration of a trust within the provisions of the statute is not void, but only unenforceable, appears clearly when we consider such a case as Gardner v. Rowe (23). In substance the situation amounted to this: A, being at the time perfectly solvent, orally declared a trust in favor of B. According to the theory, a trust is created, but A may defeat any proceeding to enforce it brought by B by pleading the statute of frauds. Suppose now A becomes insolvent and has numerous creditors. So situated, he is not entitled to make gifts of his property in fraud of his creditors, and an attempt to create a wholly new and gratuitous trust would be invalid. The courts hold, however, that the execution by A of a memorandum in writing, recognizing the previous oral trust in favor of B, is entirely legal and valid in such a case, as it creates no new trust but merely deprives A of the defense he previously had to the suit to enforce it. The result is that A, so long as he remains solvent, may

(20) Loring v. Palmer, 118 U. S. 321.
(21) Oliver v. Hunting, 44 Ch. Div. 205.
(22) Newkirk v. Place, 47 N. J. Eq. 477.
(23) 2 Sim. & St. 346.

refuse to recognize the trust and thus use the property for himself; but, if he finds himself insolvent, he may recognize the trust and deprive his creditors of the benefit of property which all along he could have kept away from the cestui que trust. Of course he is under no legal obligation to do this, but may, if he prefers, allow his creditors to take the property. The rule in these cases is hard to understand on principle, and not very satisfactory in its practical operation, but is recognized in nearly all jurisdictions. It is sometimes sought to explain it on the ground that the statute creates a rule of evidence, viz., that none but written evidence is admissible to establish trusts within the statute. This proposition fails, however, when it is held, as it has been, that a defendant in his answer to the bill may set forth the terms of the trust, but still avail himself of the statute if he relies on it in the answer (§ 54, above). If the rule were only a rule requiring written evidence, an answer of this kind would satisfy its requirements.

CHAPTER IV.

CREATION OF CONSTRUCTIVE TRUSTS.

Section 1. Classification of Trusts.

§ 57. **Usual classification of trusts.** Following in the footsteps of the courts, most writers recognize a three-fold division of trusts, viz.: (1) express; (2) resulting; and (3) constructive. We have already noted carefully the characteristics of the first of these classes, trusts based upon an intention duly expressed in words contained in a will, deed, or written declaration of trust, or in an oral declaration of trust where the statute of frauds does not apply. It remains now for us to consider carefully these other supposed classes of trusts, to which thus far we have given only incidental attention. To begin with, it was suggested above (§ 41) that fundamentally all trusts were, as to origin, of two instead of three kinds. These two classes were (1) trusts based upon the expressed intention of the parties; (2) trusts based not upon any intention or agreement of the parties, but imposed or constructed by equity upon the principle that no one shall unjustly enrich himself at the expense of another. The express trusts of the three-fold classification usually adopted fall within the first of these two classes. What of the other two?

§ 58. Constructive trusts. For convenience, let us consider the third class in the usual classification, before we examine the second. When we come to examine the cases included under this heading, we shall find that all constructive trusts fall within the second class in the suggested two-fold classification, i. e., they are trusts imposed by equity upon the owner of property for reasons of natural justice and equity, which are perhaps best summed up in the proposition that no one may unjustly enrich himself at another's expense. This will come out clearly as we proceed with the detailed examination of the cases, so that details or concrete illustrations are for the moment passed over. The name, constructive trusts, is therefore entirely accurate.

§ 59. Resulting trusts. The second class of cases, the so-called "resulting trusts," are the ones which have given most writers the greatest difficulty. Underhill, for example, says that "resulting trusts . . . are clearly constructive" trusts, and so puts them under that heading (1). Some other writers do the same. It will be shown later, however, that not all resulting trusts can be so treated, although some can. In reality, as we shall see in our discussion of the cases, the "resulting trusts" of the usual classification do not constitute a homogeneous class, but are in part constructive trusts and should be so classified; but as to another part are really trusts based upon an intention of the parties. This intention, however, is not expressed in words—at least not directly so—but is implied from the acts of the parties and the

(1) Underhill on Trusts (Am. Ed.), 11.

surrounding circumstances. In such cases, the trust arises because of an intention that it shall arise, expressed however, not in words but in acts. It is as true in law, as in other relations of life, that in many cases "actions speak louder than words."

§ 60. **A scientific classification of trusts.** A classification of trusts based upon their origin would divide them into the two fundamental classes suggested above. These might be called, respectively, (1) express, and (2) constructive trusts. The first class would be based upon an expressed intention of the parties; the second would be based upon the principle of unjust enrichment, and would be imposed by equity without any agreement of the parties. The first class would be subdivided into two groups: (a) trusts expressed in words; (b) trusts expressed by acts, or "implied in fact," to use a well-recognized phrase in the law of contracts. Perhaps it would be well to confine the term "express trust" to its classic meaning of trusts expressed in words. If so, we should have then the fundamental division into two classes: (1) trusts based on intention, and (2) trusts imposed by equity; and class (1) would be subdivided into (a) express trusts and (b) trusts implied in fact (2).

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(2) If the reader will turn to the article upon Quasi-Contracts, § 3, in Volume I of this work, he will find that he can draw an interesting analogy from the classification there found, viz., (1) contracts and (2) quasi-contracts, the former being divided into: (a) express contracts and (b) contracts implied in fact. The quasi-contracts correspond to the constructive trusts as here defined.

Section 2. Resulting Trust Where A Pays Purchase Price and B Takes Title.

§ 61. Effect of statute of uses. Before the enactment of the statute of uses, when one was buying land and did not wish, for the reasons discussed in our first chapter, to have the legal title vested in himself, one of the common ways, indeed the usual way, seems to have been to have the land transferred directly to another person, who agreed orally to hold it for the use of the one paying the purchase price. In such a case, of course, the one to whom the title was thus transferred was compelled by equity to hold the same for the benefit of the one paying the money. So common did this transaction become, that if nothing else were shown except that A paid the money for the land and the title was conveyed to B, the chancellor assumed that B was to hold the property for the use of A. After the passage of the statute the legal title would, in such a case, of course be vested by the statute in A, unless the use in question were one of the kinds to which, as set forth above (§ 11), the provisions of the statute did not apply. In all the exceptional cases, the use, or trust, as it came to be called, still "resulted," as it was said, in favor of the one paying the money.

§ 62. Effect of statute of frauds. The statute of frauds, as we have seen (§ 53), does not apply to trusts that "arise or *result* by the implication or construction of law." The use of the word "result" here seems to indicate that it was not the intention of the framers of the statute to require the oral agreement of the one to whom the title in these cases is conveyed to be put in writing,

and accordingly the courts held that these "resulting trusts" were not within the provisions of the statute (3). This is an interesting result, for the reason that, as the foregoing account shows, these trusts are based upon an expressed intention as much as trusts based upon an express declaration of trust. The reason, however, is to be sought in the confusion of thought which fails to distinguish between an implication of fact, of actual intention, based upon acts and surrounding circumstances, and the so-called "implication of law" which is nothing more nor less than an imposition by law of an obligation and not a real implication at all. Trusts based upon the "implication of law" are, according to the classification suggested above, real constructive trusts, and not based upon any presumed intention in fact at all; while "resulting trusts" of this kind are "trusts implied in fact" and fall within the first main division of our classification.

§ 63. **Real nature of these trusts.** That this class of resulting trusts are to be classified as trusts based upon an expressed intention of the parties appears very clearly, when we find that the cases permit evidence to be admitted to show that although A paid the money, title going to B, it was not the intention of the parties that a trust should exist in A's favor. For example, in Cook v. Patrick (4), the facts were that one S, all his immediate family being dead, paid for various parcels of land, which he had deeded directly to various nieces and nephews. S went into possesion of the lands in question

(3) Anonymous, 2 Ventris, 361.
(4) 135 Ill. 499.

and retained possession of the same, as well as of the deeds, until his death. After his death, his heirs-at-law, who were not the same persons as the nephews and nieces, brought an action against the latter to have a "resulting trust" in favor of S established, on the ground that he had paid the money. The court held that the evidence in the case clearly showed an intention that a trust for his life only was intended to result to S, but that after that the intention was to have the beneficial interest in the lands go to the nephews and nieces. In other words, while there is a presumption of fact in such cases, arising from the mere fact of the payment of the purchase price by one and the conveyance to the other, that a trust is intended for the one paying the money, such presumption, being only one of fact, may be upset or rebutted by evidence showing that such was not the intention. The presumption makes out a prima facie case of a trust, which will prevail unless overcome by evidence to the contrary.

§ 64. **Methods of rebutting presumption of resulting trust.** Still more clearly does the real nature of this class of trusts appear when we consider cases in which B, the one to whom the title is conveyed, is a near relative to A, the one paying the money—say a son, daughter, or wife. For example. in Dyer v. Dyer (5), the one in whom the title was vested was the youngest son of the one who paid the purchase money. The latter being dead, the eldest son as plaintiff sought to establish a resulting trust in favor of his father and so of himself as heir. The court

(5) 2 Cox, 92.

held that the presumption of fact of a resulting trust was rebutted by another presumption of fact of greater weight, viz., that when the one receiving the title was a child, it was presumed, in the absence of evidence to the contrary, that a gift to the child by way of advancement was intended, and so no trust in favor of the father. The discussion by the court in Dyer v. Dyer is one of the best upon the subject, especially the following passage:

"The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or *successively*—results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes rightly on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a court of equity that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees being a child or children of the purchaser is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called in question; namely, that such circumstance shall rebut the re-

sulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law; surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus, it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides."

§ 65. **Rebuttal of counter presumption.** The presumption that a gift to the child is intended is, again, as stated, only a presumption of fact, which outweighs the other presumption that a trust is intended. It may be in its turn upset by evidence showing that, in spite of the relationship of father and child, no gift was intended. The surrounding circumstances, the acts of the parties at the time, and after the transfer to the child, may in a particular case show that after all a trust in favor of the parent was intended. This was the situation in the case of Stock v. McAvoy (6). In that case the father paid for the land, collected the rents, gave tenants notice to quit, and generally dealt with the land as his own. The father being dead, the controversy arose between the son in whom the legal title was vested, and the per-

(6) L. R. 15 Eq. 55.

son who would be entitled to the property if a trust in favor of the father existed. On all the facts, the court decided that the presumption of a gift to the son was rebutted and a resulting trust in favor of the father established.

§ 66. **Resulting trust in favor of one paying portion of purchase money.** The doctrine which creates a presumption of fact that a trust is intended in favor of the one paying the purchase price, is, by a majority of the courts, extended to cover cases in which the one seeking to establish the trust pays a portion only of the purchase price. In one case (7) the plaintiff furnished only a portion of the purchase money, the defendant, in whose name the title was taken, paying the balance. It was held that a trust resulted in favor of the plaintiff for a pro rata share of the property. On a similar state of facts the opposite conclusion was reached in Massachusetts (8). The real question in such cases is this: Is it a fair inference, from the fact that A paid $3000 and B $2000 for the land, title being conveyed to B, that the intention of the parties was that A should have a three-fifths interest and B a two-fifths interest in the land? The other possible view is that A is loaning B money, and if so, is entitled to an equitable lien on the land as security for the repayment of the sum loaned. The better view seems to be that taken by the majority of the courts, viz., that there is in fact a presumption that the parties were jointly buying the property. As in all these cases,

(7) Springer v. Springer, 114 Ill. 550.
(8) McGowan v. McGowan, 14 Gray (Mass.) 119.

this is only an inference of fact, and so, if, at the hearing, it appears the transaction was a loan, the presumption of a trust is rebutted and effect given to the real intention of the parties. The only object in finding the resulting trust, or rather the presumption of one, is to open the way to the introduction of oral evidence; for, if an express trust is relied on, it is within the provisions of the statute of frauds and may not be proved by oral evidence.

§ 67. **Such resulting trusts abolished in some states.** In New York and in some other states that have followed New York in regulating the whole question of trusts by statute, statutory provisions exist which abolish trusts of this kind in favor of the one paying the money (9). These statutes, however, usually preserve the resulting trust for the benefit of the creditors of the one paying the money. The latter are therefore entitled, when necessary, to establish the trust in the same way that, before the statutory change, the one paying the money did (10). Such provisions, also, do not abolish constructive trusts which arise where one entrusted with another's money, in violation of his duty, invests it in real estate or other property in his own name, without the consent of the one entitled to the money. For example, an agent who invests the money of his principal in real estate, without the latter's knowledge or consent, and takes the title in his own name instead of that of the principal, is a constructive trustee of the land for his principal and may be so held. Such a trust is a real constructive

(9) Skinner v. James, 69 Wis. 605.
(10) Niver v. Crane, 98 N. Y. 40.

trust, i. e., one imposed by equity and not based upon any intention, expressed or presumed (11).

Section 3. Resulting Trust From Conveyance of Property Without Consideration.

§ 68. Effect of statute of uses. In our first chapter, dealing with uses before the statute of uses, we saw that the first uses were those in which A, owning land, conveyed the same to B on an agreement, usually oral, to permit A to have the benefit of the land. The conveyance was, at that period in the development of our law, made by feoffment with livery of seisin, a transaction amounting to a symbolical physical delivery of the land to the feoffee, with intent to pass title to him. It was to abolish this very practice of enfeoffing another to the use of the feoffer, as we saw, that the statute of uses was passed. That statute enacted it will be remembered, that the use in favor of A should be turned into a legal interest. The result was that after the passage of the statute of uses, this kind of a "resulting use" could not survive as a "resulting trust." The statute, however, gave rise to a new method of conveying land. If A, owning land, bargained and sold (agreed for a consideration to transfer) the same to B, equity, before the enactment of the statute, held that a use was created in favor of B, the bargainee. The statute, after its enactment, "executed" the use by vesting the legal title in B. Thus the deed of bargain and sale was introduced into our law. This was merely an instrument containing, in writing and under

(11) Reitz v. Reitz, 80 N. Y. 538.

seal, the bargain and sale, i. e., the agreement to sell and convey, a consideration for the promise being recited. It was held that, if the deed recited a consideration, a use which the statute would execute existed in favor of the bargainee, B; and it was not necessary that a consideration be actually paid. It was therefore possible to convey land by deed of bargain and sale without any consideration being paid and feoffment with livery of seisin was no longer necessary. The question then arose: If by deed of bargain and sale (or lease and release, which for our purposes is substantially the same thing) A conveyed Blackacre to B, no consideration being paid, was there a resulting trust in favor of A, as before the statute there would have been on a common law feoffment without consideration?

§ 69. **Same (continued).** When we stop to consider the manner in which the deed of bargain and sale took effect so as to transfer the legal title to B, we can see at once that the question just asked must be answered in the negative. The title passed to B because the bargain and sale for a consideration (at least an alleged consideration) created a use in favor of B, upon which the statute could act and vest the title in B. This being so, it would obviously not do to say in the next breath that a second use or trust, inconsistent with the first, resulted in favor of A. Accordingly it was held that the statute of uses finally and forever abolished this form of resulting use (12). This being true, suppose that we take the case of the conveyance by A to B of Blackacre, by

(12) Shortridge v. Lampleigh, 2 Ld. Raym. 798.

deed of bargain and sale, and B orally agrees to hold the same in trust for A and to reconvey to A on request. There being no resulting trust in favor of A, he can get no relief on that score. The express agreement, being oral, does not satisfy the provisions of the statute of frauds, and so A cannot rely upon that. May B therefore keep the land, although he paid nothing for it, and although he promised to reconvey it to A on request? It was so held in the earlier English cases (13), and that still represents the rule in many American jurisdictions (14). Later English cases, however, have taken the view that, although the express trust is not enforceable and there is no resulting trust, i. e., a trust based upon presumed intention, a constructive trust exists which compels B to retransfer Blackacre to A.

§ 70. Basis for a constructive trust when conveyance without consideration. In the law of contracts, it has always been recognized that where, in pursuance of a contract unenforceable because not in writing in compliance with the statute of frauds, property has been conveyed or services rendered, the one receiving the same, if he wishes to do so, may rely upon the statute, but only on condition of becoming liable to a suit in quasi-contract for the reasonable value (not the contract price) of the property or services in question. See Quasi-Contracts, § 54, in Volume I. Does not the same principle govern in the cases we are now considering? Let us for a moment consider a slightly different case. Suppose A and B

(13) Lloyd v. Spillet, 2 Atkyns, 148; Leman v. Whitley, 4 Russ. 423.
(14) Rasdall v. Rasdall, 9 Wis. 379.

should agree orally to exchange real estate—A to convey Blackacre to B, and B to convey Whiteacre to A. A conveys Blackacre to B, and B then refuses to convey Whiteacre to A. Of course, since the agreement is oral, the statute of frauds applies and the oral agreement is not enforceable. It is clear that in such a case B, on a bill in equity filed by A, would be compelled to restore Blackacre to A, as any other result would permit B to enrich himself unjustly at A's expense. Now let us return to the case we are discussing—the conveyance to B without consideration, on B's oral agreement to reconvey on request. Granting that the oral agreement is not enforceable, does it follow that B may keep the land? Does the mere fact that the principle, which forbids one to enrich himself unjustly at another's expense, in this case happens by accident to require B to do substantially the same thing he agreed to do, furnish any basis for refusing to apply it to a case falling clearly within its scope? It would seem not, and accordingly the later English cases compel B to reconvey the property (15). As the court said in Haigh v. Kaye: "It is not honest [for B] to keep the land."

Section 4. Resulting Trust Where Intended Trust is Ineffectual.

§ 71. Statement of problem. In an early case dealing with this part of our subject, it appeared that a man seised in fee of land conveyed it in fee to certain trustees, upon trust that they should sell the lands and pay out of

(15) Davies v. Otty, 35 Beav. 208; Haigh v. Kaye, L. R. 7 Ch. App. 469.

the proceeds certain sums to certain persons named in the instrument of conveyance, the residue to be paid to B, his executors or administrators, except that £200 was to be paid "to such person as he (the one making the conveyance) by any writing under his hand should direct." Before making any written direction, however, the person making this arrangement died. The question was, who was entitled to the £200, whether the trustees, or B, or the heir of the one who made the settlement? It was clear that the testator did not intend the trustees, who held the legal title to the property, to have the benefit of it. On the other hand, it was equally clear he did not intend to have it go to B. What should be done with it?

§ 72. The "resulting trust" here really a constructive trust. From the foregoing statement of the problem, two things at least are clear: (1) the intention of the testator cannot be carried out, for we do not know to whom he intended to direct the money to be paid; (2) we do know that he did not intend the trustees or B to have it. If equity permits either B or the trustees to have the benefit of the fund, it will be permitting them to enjoy something the testator did not intend them to have, but, unless it takes some action, it is obvious the trustees will have the property in question, as they legally own it. Under such circumstances, following the analogy of the rules of the common law as to the devolution of property on a man's death, equity compels the trustees to devote the property to the benefit of those who would have received it if the testator had died intestate. If it be real estate,

these will be the heirs at law; if personal property, the next of kin. In this case, the money, being the proceeds of real estate, is regarded for this purpose as real estate, so it was decreed by the court, that it should go to the heir at law. This result is not based upon any presumed intention on the part of the deceased, but is a genuine constructive trust, based upon the principle of unjust enrichment. It is however, usually called a "resulting" trust by the courts, which have never followed any scientific classification of trusts. The reason for calling it a resulting trust seems to be that the trust results or comes back to the heirs or next of kin, as it did in the case of the old resulting use which arose where a conveyance was made without consideration. That was, however, as we have seen, a trust based upon an intention to create one; this trust is based upon equity's idea of what should be done, where the intention which was expressed cannot be carried out and no other intention is expressed.

§ 73. **Same: Illustrations.** Whenever a court decides that a proposed trust is void for being too indefinite and uncertain in its object, and that the trustee will not be allowed by equity to carry out the testator's intention, it follows, by the simple application of the principle we are discussing, that the property must be returned by the trustee to the testator's heirs or next of kin. See § 103, below. Other cases illustrating the principle are where the intended trust is void as contravening the law, for example, the statutes of mortmain. In Strikland v. Ald-

ridge (16), the testator devised the land to a trustee, in trust to use it for a purpose forbidden by the statutes of mortmain. The intended trust being illegal, but it also being clear that the testator did not intend the trustee to have the benefit of the property, the trustee was compelled to hand over the property to the heir at law of the testator. It is, of course, essential in these cases to find two things: (1) an intention to impose a trust obligation on the one to whom the property is left; (2) that that intention cannot be carried out. If the testator did not intend to impose any obligation, but merely to express a wish, desire, or hope, that the devisee or legatee would do the thing in question, the principle in question has of course no application. It is not unconscientious for the devisee or legatee in that event to keep the property for himself, as it was the intention of the testator to leave him free to do so if he felt so inclined.

Section 5. Resulting Trust Where Trust Created Does Not Exhaust Property.

§ 74. **Statement of problem.** It sometimes happens that an intended trust takes effect, but fails to exhaust the entire property placed in the hands of the trustees. Here again the question arises: Who is to receive the benefit of the balance, the trustees, the residuary devisee or legatee (if there be one), or the heirs or next of kin? As in the previous case, it can be readily seen that if we find that the testator did not intend the trustees to have the benefit of the property, we must dispose of the property

(16) 9 Ves. 516.

in a manner similar to that just discussed, where the intended trust failed to take effect at all. But can we assume that such really was the intention of the testator? We shall find upon investigation that the answer to that cannot be given without reading the will carefully.

§ 75. No resulting trust if devise be subject to payment of certain sums. It may be that in a given case the testator had in mind the very fact that the trust he was creating would not exhaust the property, and that his intention, as gathered from the will, was that the trustee should have what was left after discharging the other trusts. For example, in Clark v. Hilton (17), the testator left his personal property to H "subject to the payment of my debts, personal and testamentary expenses, and legacies, and to the trusts hereinafter contained," the will then enumerating various trusts which did not exhaust the estate. It was at once clear to any one reading the will that the testator had in mind a gift to H, who was his grandson, but wished to obligate him to provide out of the estate for certain others, leaving him the balance. The court accordingly held that in such a case the mere fact that the trusts enumerated did not exhaust the estate did not make H a trustee for the next of kin, although of course in such a case the one receiving the property holds it subject to an equitable "lien" or "charge" in favor of the persons named in the will. The precise character of an "equitable charge" as distinguished from a trust will be discussed later (§ 90, below).

§ 76. Resulting trust if gift in trust for certain pur-

(17) L. R. 2 Eq. 810.

poses. On the other hand, if the testator provide, as he did in Ellcock v. Mapp (18), that he gives the property "to E, to and for the several uses, intents, and purposes following; that is to say," enumerating the trusts, or in similar language, it is clear that he does not expect E to derive any benefit from the property. If we find that to be the case, then of course if it turn out that, contrary to the testator's expectations, a residue is left after all trusts have been carried out, equity will not permit the trustee to keep what is left for himself, but will raise a trust in favor of the heirs or next of kin, as the case may be. This trust, usually again called a resulting trust, is also a trust imposed by equity on principles of justice, and so should be classified as a constructive trust. Now there is no magic in language and it is purely a question of the fair meaning of the words of the testator, whether he intended the trustee to get a beneficial interest in the property or not. The use of any particular words is not necessary, though usually a gift "subject to" certain things means a gift of the beneficial interest to the devisee or legatee, while a gift "in trust for" certain purposes means the opposite. The context, in any particular case, however, may show this not to be the case.

§ 77. **Same: Illustration.** One of the best discussions of the subject to be found in the books is contained in the opinion of the court in the case of Skellenger's Executor v. Skellenger's Executor (19), in which the will left the residue of the estate to the executors "to have and to

(18) 3 H. L. C. 492.
(19) 32 N. J. Eq. 659.

hold upon and subject to the following trusts, to wit:" enumerating them. The trusts described failed to exhaust the residue, a fact the possibility of which seems to have escaped the attention of the testator. In holding that the trustees held the balance in trust for the persons entitled to property, under the statutes of distribution where a person dies intestate, the court said: "It is also insisted that the widow should not be permitted to take any part of this fund, because it is apparent, upon the face of the will, that the testator intended she should not. This intention, it is said, must be inferred from the fact that he gave her the use of the whole during her life, and he could not, therefore, have intended that she should take a part absolutely. In other words, having given her a part by express words, it must necessarily be inferred that he did not intend she should have any more. This argument, it will be observed, proceeds upon the assumption that the right of distribution is to be regulated by the intention of the testator. But this, I think, is a mistake. The intention of the testator is to govern only so far as he has declared it by his will. With regard to that part of his property which his will did not pass, it must be declared he had no will, and therefore the court cannot know his intention concerning it. The next of kin cannot take until intestacy is found, and then they take, not in pursuance of the testator's intention, but by force of law, regardless of what his intentions were."

The reader who is interested in pursuing the subject

may also consult with profit the case of Bond v. Moore (20).

Section 6. Oral Trusts Enforced to Prevent Fraud.

§ 78. **Problem stated.** We have seen that the provisions of the statute of frauds require trusts of real estate to be evidenced by a writing signed by the proper person, unless they be contained in a will. Suppose now a testator makes a will, leaving property to a person on the face of the will as an absolute gift, but actually on an oral agreement to hold in trust for others; or, as in some cases, on trusts to be communicated orally, or by writing to be executed later, without the formalities required by the statute governing the validity of wills. Suppose further that before the testator's death the intended trustee be informed of the trusts orally or by means of the letter or other writing, and that he assents to them. This writing, if it exist, cannot operate as a present declaration of trust, for the gift in the will is not a present gift, but is revocable at any time before the death of the one making it; and so the provisions as to the trust cannot take effect until the will does. Here we have a very obvious attempt to reserve the right to make a testamentary disposition of property, i. e., a disposition to take effect only on one's death, without complying with the statute of wills, which requires in addition to a signed instrument, other formalities, such as witnesses, etc. May the persons, for whom the devisee or legatee has thus orally agreed to hold the property in trust, compel him, after

(20) 90 N. C. 239.

testator's death, to keep his agreement? One thing is obvious: to allow him to keep the property would work fraud upon the testator. On the other hand, to enforce the trusts leads to a violation of the statute of wills. The courts have chosen the latter alternative, and how they came to do it will be shown below (21).

§ 79. **Origin of doctrine.** Perhaps the enforcement of these oral trusts came about in this way. Testators at various times, on learning that a proposed trust would be illegal, resorted to the expedient of making an absolute gift in their wills of the property to some friend, who orally agreed to carry out the proposed trust. That, for example, was what the testator did in Strickland v. Aldridge (22) already discussed in another connection. In such cases, the courts decided that the oral trust could be proved, not for the purpose of enforcing it, but for the purpose of showing that the one who apparently, on the face of the will, was to have the property for his own use, was not in good conscience entitled to use it for himself, and that therefore, since he could not use it as testator intended, there was a resulting trust, or, as we prefer to call it, a constructive trust, in favor of the heirs or next of kin. Such a result is, of course, entirely satisfactory, as it does not in any way enforce the oral trust, but prevents the testator from circumventing other provisions of the law. The courts, however, made the mistake of calling the oral agreement a "secret trust," when, since it was void, it was no trust at all. Apparently they then

(21) Riordan v. Bannon, Ir. Rep. 10 Eq. 469; Curdy v. Berton, 79 Cal. 420.

(22) 9 Ves. 516.

took the next step, by arguing that secret trusts could be established by oral evidence, and, if not illegal, would be enforced. This was a very different thing from the other doctrine of preventing a violation of law by establishing the void agreement by oral evidence in order to defeat it. Be this as it may, the doctrine that such secret trusts are enforceable, if otherwise legal, is apparently well-settled by the weight of authority.

§ 80. **Trust must be disclosed to trustee during lifetime of testator.** In the case of these secret but illegal trusts, it was held that no resulting (constructive) trust arose in favor of the heirs or next of kin, unless the proposed trustee was informed of the trust during the lifetime of the testator, and either expressly or tacitly consented to carry out the illegal purpose (23). The reason of course is that otherwise the testator does not make the apparently absolute gift in reliance on the other's promise to carry out his wishes, and so the latter will be guilty of no fraud or anything unconscientious if he keeps the property for himself. The basis for the constructive trust therefore fails. So also, in the case of secret but legal trusts, if the trust be not disclosed to the proposed trustee at the time of the making of the will, or at least before the death of the testator, so that it can be said the latter relied on the promise of the former, it cannot be said to be unconscientious for the devisee or legatee to keep the property for himself, and the intention of the testator cannot be carried out.

§ 81. **Illustrations of oral trusts enforced to prevent**

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(23) Jones v. Badley, L. R. Ch. App. 362.

fraud. An excellent example of a secret illegal trust is found in a New York case (24). In that case the testatrix gave to three persons, who were her priest, her lawyer, and her doctor, the bulk of her property. On the face of the will, the gift to these persons was absolute. A letter of instructions, addressed to these persons, was produced, from which it appeared that they were to devote the property to certain charitable purposes, which she had been advised she could not legally do by inserting the provisions in her will. She therefore resorted to the expedient of the absolute devise to persons in whose honorable action she could confide, and it was proved that these three legatees agreed to carry out her wishes. This being so, the court held that the legatees were constructive trustees for the next of kin. An example of enforcement of a secret legal trust is found in the case of Curdy v. Berton (25) previously cited. Here the testatrix left the property to B, "to be distributed by him according to the private instructions I give him." B was present when the will was made and received verbal instructions to distribute the property among certain persons. The court enforced the oral trust in favor of the beneficiaries mentioned, saying that in such a case a "court of equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them, upon the ground that the legatee will not be countenanced in perpetrating a fraud by encouraging the testator to make a

(24) In re O'Hara, 95 N. Y. 403.

(25) 79 Cal. 420.

bequest, which would not otherwise have been made, and then refusing to execute his promise."

§ 82. Same (continued). The courts apply the principles underlying the enforcement of oral trusts to prevent fraud with a considerable degree of consistency. For example, where defendant requested his daughter not to make a will in plaintiff's favor, agreeing to hold for the plaintiff the property in question, which would, by operation of law on his daughter's death, come to him, the court, after the daughter's death, enforced the agreement as an oral trust of the kind we are considering (26). In another case, one who, by a will already made, was the residuary legatee, promised the testator that if no alteration were made in the will, he would pay the plaintiffs the amount they sought to obtain. In consequence of this promise on defendant's part, the testator omitted to alter the will in favor of the plaintiffs as had been his intention. The court compelled the defendant to pay the amounts in question to the plaintiffs (27). The doctrine, however, is limited by some courts to wills as distinguished from deeds. For example, in Lantry v. Lantry (28) the defendant received a deed of property from one L, promising orally to hold it in trust for the son of L. On a bill filed by the son, the court refused to enforce the oral trust, limiting the doctrine to the cases of wills; except that, in the case of deeds, the court said, if the defendant had taken active steps to have the deed made to him, as distinguished from merely agreeing to hold in

(26) Williams v. Fitch, 18 N. Y. 546.
(27) Brook v. Chappell, 34 Wis. 405.
(28) 51 Ill. 458.

trust, they would enforce the trust. This distinction, however, seems not to be a valid one, and is not followed by all courts.

Section 7. Following Proceeds of Misappropriated Property.

§ 83. Cestui's interest in proceeds of trust property. When a trustee, in breach of trust, misappropriates the trust-res by selling it or exchanging it for other property, we have seen that the beneficiary may follow the original trust-res into the hands of its new owner, in all cases except where it passes into the hands of an innocent purchaser for value (§ 14, above). This however, does not exhaust the list of the remedies of the cestui in such cases. As has been incidentally suggested at various points in our discussion, he may, if he prefers, require the trustee to devote the proceeds of the trust-res to his, the beneficiary's benefit. In other words, equity imposes upon the trustee a constructive trust obligation to hold the proceeds of the misappropriated trust-res for the benefit of the defrauded cestui (29). To apply this doctrine, it is necessary for the cestui to be able to point out the *specific* proceeds received in exchange for the trust-res, otherwise there can be no constructive trust. Whenever the proceeds cannot be specifically pointed out, there ceases to be a trust and all that the cestui has left is a right in equity to be compensated by the trustee for the breach of trust. The measure of such compensation, however, will be not only the value of the misap-

(29) Lane v. Dighton, Ambler, 409.

propriated trust property, but the value of the proceeds, if that be greater than the value of the original res.

§ 84. **Statement of problems involved.** In the present subdivision of our subject, we shall have two separate problems to solve: (1)whether the doctrine of following proceeds of misappropriated property applies to cases in which the relationship between the parties concerned was not that of trustee and cestui que trust; (2) the methods of tracing proceeds, so as to determine just how the courts require the proceeds to be identified. We shall find, in connection with the first of these problems, that we are face to face with a very broad and sweeping doctrine of equity, covering a wide range of legal relationships, the only common factor being a misappropriation of property. As to the second, we shall discover considerable confusion on the part of some of the courts, due in part to a failure to apply plain, ordinary common sense to the solution of a question of fact usually not very complicated. Let us then first of all examine the first of these problems, the scope of the doctrine of following proceeds of misappropriated property.

§ 85. **Doctrine covers all fiduciary relationships.** Our legal system, while it restricts the use of the word trust to the strict equitable relationship which forms the subject of this article, recognizes other relations of trust and confidence, using those words in a broader and less technical sense. If I lend my watch or my carriage to you, the relationship between us is that of bailor and bailee. The title remains in me, the bailor; the possession however, vests in you as bailee. Instead of returning the

property, as is your duty, you may take advantage of your possession and misappropriate the article by selling it, or exchanging it for other property. In such a case, the buyer gets no title, whether he buys as an innocent purchaser or not. I am permitted, however, following the analogy of the trust cases, to elect to let the original property go, and to hold you as a constructive trustee of the money or property received in exchange for mine (30). Another fiduciary relationship is that existing between partners, and the principle applies to that also. For example, in Shaler v. Trowbridge (31) the defendant, one of several partners, used some of the firm's money to purchase the property in question, and it was held that the other members of the firm were entitled to the proceeds as trust property. A similar result was reached in a Missouri case, in which an administrator used funds belonging to the estate in purchasing property (32). Still another fiduciary relationship is that of principal and agent, and the doctrine applies to that also—the agent who misappropriates the principal's money holds the proceeds in trust for his principal.

§ 86. **Doctrine applies to misappropriation by non-fiduciaries.** Equity has, however, not been content to apply the doctrine we are discussing to misappropriation of property by persons occupying a fiduciary position, but has, especially in the more recent cases, expanded it into a sweeping principle covering all misappropriations of property of whatever kind. For example, in Menz v.

(30) Crawford v. Jones, 103 Mo. 577.
(31) Shaler v. Trowbridge, 28 N. J. Eq. 595.
(32) White v. Drew, 42 Mo. 561.

Beebe (33) the defendant by fraudulent representations induced the plaintiff to sell him certain real property. To begin with, the result of such a transaction is that the defendant is constructive trustee of the property, plaintiff being allowed, on learning of the fraud, to file a bill in equity and obtain rescission of the contract and reconveyance of the property, on the ground of fraud. In this case, however, the defendant had already disposed of a portion of the property, and the court held that he held the proceeds of that part in trust, i. e., he was ordered to reconvey all he had left of the original property, and also to convey to the plaintiff the proceeds of the remainder. A similar case, involving a sale of personal property induced by fraud and the tracing of its proceeds by the defrauded vendor, is found in American Sugar Refining Co. v. Fancher (34).

§ 87. **Misappropriation by theft.** In all the cases discussed down to the present point, the defendant came into the possession of the property with the consent of the plaintiff. We come now to a class of cases in which that is not true, those in which the defendant simply takes the plaintiff's property without plaintiff's consent, and sells it or exchanges it for other property. Does the thief hold the proceeds in trust for the owner of the stolen article? Upon this point there is, it must be confessed, a conflict of authority; some cases, usually decided at a relatively early date, holding that the thief does not hold the proceeds in trust, and others, more es-

(33) 102 Wis. 342.
(34) 145 N. Y. 552.

pecially the later cases, applying the principle of following proceeds of misappropriated property to this situation also. As an example of the earlier view, Campbell v. Drake (35) may be cited. This case was decided in 1844. In 1872 a New York court was confronted with the same question and reached the opposite conclusion (36). In that case one W stole bonds worth $14,000 from the plaintiff and sold them, receiving in exchange certain property. The defendants had obtained a portion of this property purchased with the bonds, and had notice of the facts when they received it. They were held as trustees for the owner of the bonds. Similarly in 1897, the Nebraska supreme court reached the same conclusion (37). In that case the janitor of the bank stole the money from the bank and purchased real estate with it. It was held that the bank could follow the proceeds of its money in equity and so claim the real estate.

§ 88. **Cestui entitled to all proceeds of misappropriated property.** The cestui, or any other person whose property has been misappropriated, is entitled in equity to the whole of the proceeds received in exchange for the property, that is to say, no matter how much more valuable than the old the new property may be, in equity the one whose property was misappropriated is entitled to all that is received in exchange for it. Perhaps the most striking illustration of this is found in one of the cases already cited (38). In that case, one partner used the as-

(35) 4 Iredell, Eq. (N. C.) 94.
(36) Newton v. Porter, 5 Lansing, 416.
(37) Nebraska National Bank v. Johnson, 51 Nebr. 546.
(38) Shaler v. Trowbridge, 28 N. J. Eq. 595

sets of the firm in paying premiums upon a life insurance policy, which he had made payable to his wife. On his death the widow received the amount of the policy, which was of course much greater than the amount of firm assets used. The other partners were permitted to charge the wife as constructive trustee of the whole amount received on the policy. Of course, if in any case the value of the proceeds be less than that of the original policy, the injured party will find it more advantageous to use other remedies than the one we are discussing.

§ 89. **Where person misappropriating property pays part of price of new property.** In many cases the one misappropriating property—usually money in such cases—pays for the new property in part with his own money. As to the result of doing this, there is some conflict of authority. The view which is supported by the weight of authority and which seems to be sound on principle, is, that the one whose property has been so used is entitled to a pro rata equitable interest in the resulting property, if it is to his advantage to demand it. For example, in White v. Drew (39), previously cited, an administrator of an estate bought lands, paying $1,590 for the same. Of the purchase price he paid $950 out of the assets of the estate, and the balance out of his own pocket. This land was sold by order of the court and brought at the sale over $6,000. It was held that the estate was entitled to a pro rata share of this, or 950/1590. In a few jurisdictions, notably Massachusetts, in such cases the plaintiff would be entitled only to be reimbursed, i. e., to $950 in

(39) 42 Mo. 561.

the case just discussed, and would be given an "equitable lien" or "equitable charge" on the new property as security for the due payment of that sum (40). On the other hand, one or two states have adopted the other extreme, holding that in these cases the whole of the resulting property goes to the one whose property was misappropriated, deducting only the amount the defendant contributed (41). Applying this to the facts of the first case above, the estate would be entitled to all of the $6,000 less only $640 paid by the defendant. The view which gives a pro rata share only in such cases seems to be the most equitable and just rule of the three.

§ 90. **Cestui entitled to equitable lien or charge, at his option.** It is agreed by all the courts that in these cases the plaintiff is entitled, at his option, to an equitable charge or lien as security for repayment of the value of the original misappropriated property. This equitable charge or lien is simply a right to look to the new property as security for the due repayment of the amount misappropriated. To bring out the practical effect of this doctrine, let us suppose that in White v. Drew, above, the land had brought at the sale only $1,000 instead of $6,000. If the estate were allowed only a pro rata share, it would get from the proceeds only a portion of the value of the misappropriated property. The option of claiming an equitable lien, however, permits it to demand reimbursement of the whole amount, $950, and permits it to look to the $1,000 as security for that amount.

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(40) Bresnihan v. Sheehan, 125 Mass. 11.
(41) 64 N. J. Eq. 334.

§ 91. **Method of tracing mingled proceeds: Early view.** Whether or not one article was received in exchange for another is of course purely a question of fact, but in some cases it may be difficult to establish the truth of the matter one way or the other. The burden of proving that the article alleged to have been received as proceeds of the plaintiff's property was actually so received, is of course on the plaintiff. The courts have had the greatest difficulty in dealing with the solution of questions of this kind in cases where money is mingled with money. In some early cases the wise (?) remark was made that "money has no earmarks" and it was therefore concluded that if the trustee mingled money belonging to the trust estate with money of his own, the cestui lost all claim upon any specific property, for of course he could not identify the particular pieces of money originally held in trust for him. That fact, however, does not settle the question at all. If we give a cestui a *pro rata* share in real estate purchased in part with trust funds and in part with money belonging to the trustee, is it not absurd to say that if the trustee mingles the two sums of money together, the cestui has no interest in the resulting mass? Why not say that the beneficiary is entitled to a pro rata equitable interest in the resulting sum, or, at his option, to an equitable lien or charge on the same? Yet some of the cases, chiefly of an early date, refuse to allow the cestui any equitable interest in the resulting sum (42). The contrary view is now, however, sup-

(42) Steamboat Co. v. Locke, 73 Me. 370.

ported by the overwhelming weight of authority, and appears to be the only sound view on principle.

§ 92. Same: View based on various presumptions. In the case of Knatchbull v. Hallett (43), the trustee of bonds wrongfully sold them and paid the proceeds into his own personal account at the bank, thus inextricably mixing them with his own funds. He then drew checks on the account for his own personal use, making, of course, other deposits of his own funds from time to time, but at his death there was left, and always had been left, an amount sufficient to reimburse the cestui. The court permitted the cestui to claim out of the amount left in bank an amount sufficient to reimburse him. An attempt was made to apply dicta found in earlier cases, to the effect that in such a case the trustee would be presumed to have drawn out the sums of money in the same order in which they were deposited. Any such rule would of course bring it about that the trust fund would have been drawn out and spent long before the trustee's death. The court refused to apply any such violent presumption, but, to justify its conclusion, resorted to another presumption equally unjustifiable. They held that it must be presumed that the trustee did not intend to commit a breach of trust, and that therefore he drew out his own money first and so always left the trust funds in the bank. Before we test the validity of that rule, let us examine the later cases. It must be noted, however, that any such presumption in these cases would often be a pure fiction, for we are usually dealing with embezzling trustees.

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(43) 13 Ch. Div. 696.

§ 93. **Same: Theory of equitable lien.** In Oatway's case (44) the delinquent trustee, after mingling the trust fund with his own funds in his personal account at the bank, bought certain shares of stock in a corporation with the first money which he drew out of the bank. Later he checked out and so spent all the rest, leaving no proceeds of the same. Applying the rule suggested in the case of Knatchbull v. Hallett, when he bought the shares of stock, he did so with his own money, and when he spent the remainder of the fund, he spent the trust funds. The court held, however, that the cestui was entitled in equity to have enough of the shares of stock to reimburse him for the amount of the misappropriated funds. Upon what principle is this result reached? The simplest view is that in these cases the beneficiary of the trust is entitled to an equitable lien or charge upon the whole bank account. Being so entitled, when any money is drawn out, the lien—the whole lien—attaches to that part as well as to the other. When he buys anything with any portion of the fund, the lien attaches to that also. In Knatchbull's case, the lien attached to what was left in the bank; and in Oatway's case, to the shares of stock. This accomplishes the equitable result of securing to the cestui reimbursement, without indulging in any violent and untrue presumptions about the fraudulent trustee's intention. The chances are that he intended to spend all the money for himself, but the equitable charge is not based on any intention, real or presumed, on his part, but upon the equity and justice of the situation.

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(44) In re Oatway [1903] 2 Ch. Div. 356.

§ 94. **Same: Extreme illustration of latter view.** With one more illustration of the application of the doctrine, we must close our discussion of this branch of the subject. In City of Lincoln v. Morrison (45), the city treasurer wrongfully loaned to the Lincoln Bank $5,000 belonging to the city. The bank of course knew of the illegality of the transaction, and so held the money in trust for the city. The bank turned the money into its general funds, and ultimately became insolvent. It appeared that, shortly after the illegal loan, the bank purchased, with a portion of its funds, with which of course the city funds were mingled, certain personal property which passed into the hands of the receiver of the insolvent bank. The receiver sold this for $3,334.37. This was the only property the bank had left. The court held that, as against the bank and so as against unsecured creditors of the bank, the city had an equitable charge on the money resulting from the sale of the personal property purchased in part with the city's money, and as that equitable charge amounted to $5,000, the city obtained all the money in the receiver's hands.

Section 8. Some Other Constructive Trusts.

§ 95. **Renewal of lease by trustee.** In the space at our command we can only suggest some of the large number of other ways in which constructive trusts may arise. One of the most interesting is found in the leading case of Keech v. Sanford (46), decided in 1726. In that case the trustee held in trust for an infant a lease for years

(45) 64 Neb. 822.
(46) Select Cases in Ch. 61.

of certain real estate. The lessor, on the expiration of the lease, refused to renew it for the benefit of the infant. Thereupon the trustee took a renewal of the same for his own benefit. It was held that the trustee held the new term of years, thus obtained in entire good faith, for the benefit of his original cestui. This apparently harsh doctrine is based upon sound public policy. In order to keep trustees out of temptation, as well as to prevent the necessity of inquiry in each case into the motives or purposes of the trustee, equity has established the rule that a trustee absolutely cannot acquire a renewal of the lease, except for the benefit of the cestui. Were it not so, he might very easily conspire with the lessor and so get the benefit of the opportunity for renewal which usually comes to a tenant. The whole doctrine is reviewed and adopted by Chancellor Kent in Davoue v. Fanning (47), and is as sound law and equity today as it ever was.

§ 86. **Agent employed to buy or sell property may not act for himself.** In Lees v. Nuttall (48) the defendant was employed by the plaintiff to act as agent for him in the purchase of a certain piece of property. Without having given up his agency, defendant purchased the property for himself. On this state of facts he was charged as a constructive trustee of the property purchased for the plaintiff, who of course had to pay the purchase price. Similarly, in another case (49) agents for the sale of certain lands pretended to sell to others, but actually bought the lands themselves. At the time, their princi-

(47) 2 Johns. Ch. 252.
(48) 1 Rus. & M. 53.
(49) Rich v. Black, 173 Pa. St. 92.

pal expressed herself as satisfied with the sale, but, on learning that they were the purchasers, brought a bill to charge them as constructive trustees of the land, and succeeded in doing so. Like that of the trustee, the incapacity of the agent to act for himself is an absolute one, and good faith is no defence.

§ 97. **Tenant for life and remainderman.** In Taster v. Marriott (50) a leasehold interest in the land was vested in A for life, and after A's death to B absolutely. The lease being about to expire, A, tenant for life, obtained a renewal of the same for his own benefit. A devised the lease by her will, so that on her death it passed to the devisee. The latter was, on a bill filed for that purpose, charged as constructive trustee for B of the remaining portion of the lease. The reason given for this rule is that the one who gave the lease to A and B, on the above terms, did not intend A to have more than a life interest, and so, in order to carry out that intention, equity refuses to allow A to get the benefit of a renewal so as to extend his interest in the property beyond his own life.

§ 98. **Mortgagor and mortgagee.** The same principle is applied where the relationship is that of mortgagor and mortgagee of a leasehold. For example, in Rushworth's case (51) A mortgaged a leasehold to B. The lease being about to expire, B had it renewed. On paying off the mortgage, A is entitled to the leasehold interest. The principle works the other way, also, i. e., if A, the mort-

(50) Ambl. 668.

(51) 2 Freem. Ch. 13.

gagor, obtains a renewal, B may hold that as subject to the mortgage (52).

§ 99. **Partners.** A partner who obtained a renewal of the lease of the premises occupied by the firm, and of which the partnership held the original lease, was charged as constructive trustee for the other partners in the case of Featherstonhaugh v. Fenwick (53). The same doctrine was applied in the American case of Mitchell v. Read (54). It seems, however, that here the incapacity is not an absolute one, but that the partner, if he acts openly and above board, informing his partners of what he is doing, may obtain the renewal of the lease for his own benefit.

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(52) Smith v. Chichester, 1 C. & L. 486.
(53) 17 Ves. 298.
(54) Mitchell v. Read, 61 N. Y. 123.

CHAPTER V.

THE PARTIES TO A TRUST.

SECTION 1. THE CESTUI QUE TRUST.

§ 100. No specific cestui necessary in public or charitable trusts. Thus far the trusts which we have been considering have been of the kind known as private trusts, trusts for the benefit of a particular person or number of persons. Another kind of trust exists when property is vested in trustees for the benefit of a class of persons, the individual members of which are not specifically named or described in the instrument creating the trust. Such trusts are known as public or charitable trusts, and for many purposes require separate treatment from ordinary private trusts. Examples of such trusts are: gifts to trustees to build a public library; for the relief of the poor of a particular community; for the promotion of science, learning or useful knowledge; and other similar purposes (1). In the space at our command we cannot go into the details of the law as to just what are held to be objects for which such public or charitable trusts may be created. Limitations are, however, placed upon one who would create such trusts, as to the purposes he may thus seek to promote. The matter is largely affected by a statute known as the statute of 43 Elizabeth, c.4, which describes many of the purposes for

(1) Saltonstall v. Sanders, 11 Allen (Mass.) 446.

which such trusts may be created, but, as Mr. Justice Gray said in one of the leading cases on the subject: "It is well settled that any purpose is charitable in the legal sense of the word, which is within the principle and reason of this statute, although not expressly named in it; and many objects have been upheld as charities, which the statute neither mentions nor distinctly refers to." He adds: "A precise and complete definition of a legal charity is hardly to be found in the books. The one most commonly used in modern cases, originating in the judgment of Sir William Grant, confirmed by that of Lord Eldon, in Morice v. Bishop of Durham (2)—that those purposes are considered charitable which are enumerated in St. 43 Eliz. or which by analogies are deemed within its spirit and intendment—leaves something to be desired in point of certainty, and suggests no principle."

§ 101. **Charitable trusts defined.** Later on in the same case the learned justice attempts a definition of a charitable trust, as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is

(2) 9 Ves. 299, 10 Ves. 522.

charitable in its nature." The reader who desires to obtain a more detailed discussion of the purposes and objects for which these trusts may be created is referred to this case as containing an exhaustive discussion of the whole subject, with an elaborate review of the cases.

§ 102. Invalid charitable trusts. It is of course clear that gifts for purposes prohibited by or opposed to law cannot be held to be valid, even though they fall within classes of objects which otherwise would be held to be charities. For example, a bequest "towards the political restoration of the Jews to Jerusalem" was held void on the ground of public policy, as tending to create a political revolution in a friendly country (2a). So also in England a gift for the support of the Roman Catholic religion, before such gifts were legalized by act of Parliament, was held bad (3). One other general rule may be laid down, viz., the intention of the one seeking to create a trust, usually a testator in his will, must be sufficiently definite and certain, so that the trustees will be bound to use the property for some of the objects recognized by the law as charities. It is not sufficient that they *may* so use the property; they must be *bound* so to use it. If they may, in their discretion, without violating the terms of the gift, use it for other purposes, the gift fails. In such an event, the property is held by the trustees in trust for those who by law would have taken it if the testator had died intestate (4).

§ 103. Same: Morice v. Bishop of Durham. In this,

(2a) Habershon v. Vardon, 4 De Gex & S. 467.
(3) DeThemmines v. DeBonneval, 5 Russ. 288.
(4) Morice v. Bishop of Durham, 9 Ves. 405, 10 Ves. 541.

the leading case upon this subject (note 4, above), the testatrix left the property in question to the Bishop of Durham, upon trust to pay the debts and legacies, etc., and then to "dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of." In holding that, the object being too indefinite, the trust had failed and therefore the property, being personal property, went to the next of kin, the court used the following language: "The question, then, is entirely whether this is according to the intention a gift to purposes of charity in general as understood in this court; such that this court would have held the bishop bound, and would have compelled him to apply the surplus to such charitable purposes as can be answered only in obedience to decrees where the gift is to charity in general; or is it, or may it be according to the intention, to such purposes, going beyond those partially or altogether which the court understands by charitable purposes; and, if that is the intention, is the gift too indefinite to create an effectual trust to be here executed? The argument has not denied, nor is it necessary, in order to support this decree, that the person creating the trustee might give the property to such charitable uses as this court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this decree, to contend, that the trustee might not consistently with the intention have devoted every shilling to uses in that sense charitable, and of course a part of the property. But the true question is, whether, if upon the one hand he might have devoted

the whole to purposes in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes as this court construes those words; and, if according to the intention it was competent to him to do so, I do not apprehend that under any authority upon such words the court could have charged him with maladministration, if he had applied the whole to purposes, which, according to the meaning of the testator, are benevolent and liberal, though not acts of that species of benevolence and liberality which this court in the construction of a will calls charitable acts."

§ 104. **Statutory system of charitable trusts in some states.** In a few of our states the whole law of trusts, including that relating to public or charitable trusts, is regulated by statutes which introduce sweeping changes into the law, usually by abolishing all trusts except those provided for in the statutes. In these states trusts for charity, where the property is not given to a corporation duly organized and authorized to administer the trust, must usually be as specific in regard to the cestui as are private trusts. This principle, coupled with that laid down in Morice v. Bishop of Durham, leads to the result that often a trustee who is willing to carry out the entirely laudable purposes of the testator is prevented by the courts from so doing, and the property is taken from him and handed back to the heirs or next of kin of the testator (4a). Recently in New York, the original home

(4a) Tilden v. Green, 130 N. Y. 29.

of these statutory systems, the law has been amended, apparently with the purpose of restoring the law to its former condition, but space fails in which to discuss the present state of the law in that jurisdiction. A few cases are given in the note below (5).

§ 104a. **Enforcement of public or charitable trusts.** Inasmuch as the beneficiaries of the public or charitable trust are an indefinite number of unidentified persons, the due administration of the trust obviously must be enforced at the suit of some one else. The government is regarded as being interested in such cases, and the suit is brought by the appropriate law officer of the government, i. e., usually the attorney-general. If the trustees of such a trust are in doubt as to what should be done in administering the trust, they may institute a suit in equity asking the court to construe the deed or will, or give them instructions concerning what should be done. In such a case, the attorney-general must be made a party to the suit, as the government is interested and the court should have the aid of the advice of the law officer of the government in determining what should be done.

§ 105. **Necessity for cestui in private trusts.** Where the trust is a private one and so not for charitable purposes, the suit for the enforcement of the trust is of course brought by the cestui. This being so, it seems to follow that no private trust can exist unless there be a cestui. If it is not a charity, the government has no interest in the matter and so the attorney-general cannot

(5) Bowman v. D. & F. Missionary Society, 182 N. Y. 494; Mount v. Tuttle, 183 N. Y. 358.

be plaintiff; and, if there be no cestui who can sue? Let us for the sake of clearness take a concrete case. In one case in the books, the testator, Dean, left money to certain persons, called in the will "trustees," and provided that the "trustees" should apply the money to "the maintenance of the said horses and hounds for the time being living, and in maintaining the stables, kennels and buildings . . . in such condition of repair as my trustees shall deem fit" (6). The next of kin of testator sought to have the provision for the horses and dogs declared invalid, as no cestui was named. Of course the animals could not be regarded as cestuis, as they did not possess legal personality, and so could not have rights. As we have seen, a cestui is a person who has against his trustee the right that the latter shall use the property for the benefit of the former.

§ 106. A "trust" without a cestui. However, in the case just cited, the court refused to decree the provision invalid, and decided that so long as the trustees were carrying out the testator's intention, it would not interfere to prevent them from so doing. The result seems equitable and just, and is simple enough of explanation if we approach the case from the right point of view. Suppose we begin, not by asking what the name of the relationship established is, but by looking at the essentials of the situation. To begin with, the legal title, i. e., the ownership of the money, is by the will vested in the so-called trustees. The next of kin therefore cannot take by descent from their ancestor. They are asking the court

(6) In re Dean, 41 Ch. Div. 552.

of equity to take the property away from its present owners, to construct a trust for them. On what grounds? The basis for constructive trusts of all kinds is that it is not equitable for the legal owner to use the property as he is using it or proposes to use it. Clearly, if the "trustees" in the case we are discussing were using the property for their own purposes, they would be acting most inequitably. As it is, however, they are carrying out the clearly expressed purpose of the testator, one which perhaps no one can compel them to carry out, but which is perfectly lawful in itself. Why should the court interfere with them? It is difficult to see why it should, and, according to the bulk of the cases, it will not. Accordingly, similar "trusts" have been held valid where the purpose was the freeing of slaves (7), the building of monuments (8), and other definitely described purposes.

§ 107. Was Morice v. Bishop of Durham rightly decided? This brings us back to Morice v. Bishop of Durham, discussed above (§ 103). In that case also there was no cestui and the court held that, as the purposes described in the will as "benevolent and liberal" were broader than the legal meaning of "charity," the "trust" must fail and the property go to the next of kin. Apparently the only difference between that case and these cases we have just been discussing is that the purposes of the testator are broader and less definitely expressed in the former than in the latter. Our discussion of the basis for allowing the "trustees" in these latter cases to carry

(7) Ross v. Duncan, Freem. Ch. (Miss.) 587.

(8) Mussett v. Bingle, Weekly Notes, (1876) 170.

out the testator's intention leads to the conclusion that Morice v. Bishop of Durham and the long line of American decisions which adopt the principle of that case are, on principle, wrongly decided, unless we say that the testator's intention is so broadly and indefinitely expressed in them that no one can tell when the trustees are carrying it out. That, however, was not the basis on which the court placed its decision, but upon the ground that if the court could not compel, it would not allow, the trustee to carry out the testator's intention.

§ 108. **Remedy if trustees do not carry out purposes of gift.** But, it may be asked, if the validity of such "trusts" be recognized, who is to see that they are enforced? Strictly speaking, they cannot be enforced, if the "trustees" refuse to do as the testator wishes. But what can be and is done, is to allow the heirs of the testator, or the next of kin in the case of personal property, to say to the trustees: "Either use the property as the testator wishes, or give it to us;" i. e., they can prevent the "trustees" from acting unconscientiously by using the property for their (the "trustees") own benefit, but beyond that they cannot go. This result seems entirely satisfactory, and it is not necessary that we call the resulting relationship a trust. The only trust is the constructive one in favor of the heirs or next of kin, but that arises only if the trustees refuse to carry out the purposes for which the property was left to them.

§ 109. **Who may be a cestui que trust?** It follows from the results in these cases that, provided the object be not too indefinite, the gift is valid even though there be no

person as cestui. Further, it is well settled that if there be a person named as cestui, equity recognizes the validity of the trust, even though the legal capacity of that person be limited by the rules of the common law courts. If the person have the capacity to hold property, equity recognizes that he or she may be the beneficiary of a trust. Equity, for example, recognized trusts for the separate use of married women, even before the modern acts altering the husband's common law rights over the wife's property (9). The result was that the married woman might dispose of her "separate estate in equity" without the husband's consent, either by gift inter vivos or by will, whenever the terms of the trust did not prohibit such transfer.

Section 2. The Trustee.

§ 110. **Who may be a trustee?** Any person capable of holding property today is capable of holding the same in trust for others. Supposed exceptions to this rule no longer exist. In other words, any one owning property may in equity be under a duty to use it for the benefit of one or more other persons, and, if so, he is a trustee of it for those other persons.

§ 111. **An infant may be a trustee.** Since any person capable of holding property may hold the same in trust for others, it follows that an infant may be a trustee, for he can hold property (10). Of course it is never advisable to appoint an infant as trustee, for he has not the

(9) Peacock v. Monk, 2 Ves. Sen. 190.
(10) Jevon v. Bush, 1 Vernon, 342.

knowledge which a trustee should have, and cannot be held accountable as can an adult for failure to administer the trust properly (11). However, although this is so, an infant who by breach of trust acquires any property by his misconduct is held liable as constructive trustee of that property, in accordance with the principles discussed in the previous chapter. Originally, it seems, equity had no power to deprive an infant trustee of the title to the trust property (12), but, by statute in England and generally in the American states, the title of an infant trustee may, by order of the court of equity, be vested in a suitable person irrespective of how the trust arose.

§ 112. **A married woman may be a trustee.** Even before the passage of modern statutes relieving married women from their common law disabilities, equity recognized that they might hold property in trust for others. As such, however, they were subject at common law to their legal incapacity to deal with the estate vested in them (13). The married woman as trustee could not, therefore, until modern statutes intervened, convey the title to the property any more freely than a married woman holding for her own benefit, and the husband also had to sue or be sued with her in all legal proceedings connected with the property (14). By statute or judicial legislation, however, this has been generally changed, so

(11) Whitmore v. Weld, 1 Vern. 326.

(12) Anon., 2 P. Wms. 389, n. (a).

(13) Still v. Ruby, 35 Pa. St. 373.

(14) People v. Webster, 10 Wend. 554.

that in dealing with the trust property the married woman is now independent of her husband (15).

§ 113. **A corporation may be a trustee.** Originally, it seems, it was held that corporations, although they could hold property, could not be trustees for others. The idea back of this seems to have been that a corporation was a "dead body, although it consist of natural persons; and in this dead body a confidence cannot be put, but in bodies natural" (16). But as early as 1743 it was held that corporations could be trustees (17), and the rule thus established is universally recognized (18).

§ 114. **An alien may be a trustee.** At common law an alien could by transfer to him acquire title to property, but the government might by a proper proceeding deprive him of it. Accordingly, if property were transferred to an alien in trust for others, the government might step in and deprive the trustee of the title. Whether the government would hold the property in trust we shall discuss in the next subsection. Today, however, this disability on the part of an alien to hold property has in nearly all jurisdictions been done away with, so that an alien may therefore be a trustee, and an alien has even been appointed a trustee by an English court (19).

§ 115. **The government as trustee.** It is commonly said that the crown in England, or a state in this country,

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(15) Claussen v. LaFranz, 1 Ia. 226.
(16) Popham, 72.
(17) Attorney General v. Landerfield, 9 Mod. 286.
(18) Chambers v. St. Louis, 29 Mo. 543.
(19) In re Hill, W. N. (1874) 228.

cannot be a trustee. This seems to mean simply that, since the government cannot be sued without its consent, the cestui cannot file a bill in equity against the crown or the state (20). That this is true appears clearly from the fact that if the sovereign grant the title to a private person, the latter takes the same subject to the trust (21).

§ 116. **Persons of unsound mind as trustees.** Since persons of unsound mind could own property, they might be trustees of the same for others. In the absence of statute, however, the court of equity apparently could not deprive the insane trustee of the title to the trust property, but had to content itself with decreeing that he convey when he became legally capable of so doing (22). Here again, both in the mother country and in the United States, this unfortunate situation has been relieved by statutes which authorize the courts of equity to vest the title of a lunatic trustee in a suitable person. These statutes today usually apply to all trusts (23). A trustee who is of unsound mind is never liable for breach of trust, but again, as in the case of the infant, holds any property acquired through the maladministration of the trust as constructive trustee.

§ 117. **Relatives of cestui as trustee.** Where there are several beneficiaries of the trust, it is apparent that to appoint the husband of one of them, or a near blood relative, as trustee, might lead to a breach of trust. While therefore, the one creating the trust may do this if he

(20) People v. Ashburner, 55 Cal. 517.
(21) Winona v. St. Paul Co., 26 Minn. 179.
(22) Pegge v. Skynner, 1 Cox Eq. Cas. 23.
(23) Ames' Cases on Trusts (2d ed.) 218.

pleases, the courts, when called upon to do so, as a rule refuse (24). In the case just cited, Sir John Romilly, in refusing to appoint a relative of one of the cestuis, said: "I cannot depart from the rule I have adopted of not appointing a near relative a trustee, unless I find it absolutely impossible to get some one unconnected with the family to undertake that office. I have always observed that the worst breaches of trust are committed by relatives who are unable to resist the importunities of their cestuis que trust, when they are nearly related to them." However, in exceptional cases, such appointments are made, especially if there be other trustees not related to the cestuis (25).

§ 118. **A cestui que trust as trustee.** If there be several cestuis, the same remark made concerning near relatives of a cestui as trustee apply to the appointment of one of the cestuis. While the one creating the trust may make such an appointment if he wishes, and it will be valid (26), the courts in filling vacancies will ordinarily refuse to make such an appointment, but in exceptional circumstances may depart from the usual rule, as they have done in a few cases (27). However, this is never done except where there are other trustees and then the beneficiary so appointed is required to undertake to apply at once to the court for the appointment of a new trustee, if, by death of the other trustees, he becomes the sole trus-

(24) Wilding v. Bolder, 21 Beav. 222.

(25) Re Hattatt's Trusts, 18 Weekly Rep. 416.

(26) Bundy v. Bundy, 38 N. Y. 410.

(27) Ex parte Conybeare, 1 Weekly Rep. 458.

tee (28). This latter is also usually required in the case of the appointment of a husband or near relative.

§ 119. **Grounds for removal of trustee.** Ordinarily a trustee who becomes a bankrupt or insolvent will be removed by the court of equity, the ground being the danger of misappropriation of the trust-funds by a person so situated (29). However, the rule is not an absolute one, and, under special circumstances, if it seems best not to remove the bankrupt, he will be allowed to continue as trustee (30). It need hardly be stated that one who creates a trust may, if he wishes, make a bankrupt the trustee, and if he does so the court will not interfere (31). Other grounds for removing trustees are old age (32), and habitual intemperance (33); but not mere poverty or limited financial means (34), or permanent removal from the jurisdiction (35).

§ 120. **Effect of removal of trustee.** Originally, before the enactment of the statutes referred to below, the removal by equity of a trustee did not divest him of title to the trust property or vest title in the new trustee who took his place. It required a conveyance from the old to the new trustee to bring this about (36). By statute, however, in many if not most jurisdictions today, the appointment of a new trustee by the proper court vests

(28) Re Lightbody, 52 L. T. Rep. 40.
(29) In re Barker's Trust, 1 Ch. Div. 43.
(30) In re Bridgman, 1 Dr. & Sm. 164.
(31) Williams v. Nichols, 47 Ark. 254.
(32) Jones v. Stockett, 2 Bland. Ch. (Md.) 409.
(33) Fisk v. Stubbs, 30 Ala. 335.
(34) Van Boskerck v. Herrick, 65 Barb. 250.
(35) Dorsey v. Thompson, 37 Md. 25.
(36) Hart v. Sansom, 110 U. S. 151, 155.

the title in the new trustee without any further action (37). The basis of the principle which obtains in the absence of statutes is well stated as follows by a Massachusetts judge:

"Independently of statute, a court of equity cannot appoint a person to execute a transfer of the property of another . . . Courts of law can transfer the title to property. In real actions, they declare the title and transfer the possession; in personal actions, by virtue of a levy of execution, they transfer both title and possession; but decrees of courts of equity, except where statutes have made other provisions, operate only in personam. 'This power of creating and extinguishing titles the chancellor never had nor claimed to have, except when it was given him by statute. It is true that he frequently directed the sale of property, but it was by his control over the person of the owner that he made the sale effective, i. e., when the sale had been made he compelled the owner to execute a deed pursuant to the sale; and hence, when the owner was out of the jurisdiction, or labored under any incapacity, e. g., of infancy, the chancellor was powerless ' " (38).

§ 121. **Necessity for acceptance by trustee.** In the case of Adams v. Adams (39) the situation was as follows; Adams, owning a house and lot, executed, with his wife, a deed of the same to one Appleton, in fee, as trustee for his wife. The deed was duly executed with all the for-

(37) Hammond v. Granger, 128 Mass. 272.

(38) Langdell Eq. Pl. (2d ed.) sec. 43, note 4; 3 Pom. Eq. Jur. sec. 1317; Hart v. Sansom, 110 U. S. 151.

(39) Adams v. Adams, 21 Wall. 185

malities required by law, and Adams had it placed upon record in the proper registry of deeds. Subsequently the husband and wife were divorced. The husband had the deed in his possession and asserted no trust had been created. It appeared that Appleton, the proposed trustee, had no knowledge of the deed when it was executed and recorded, but that the husband intended it to take effect as a deed when he had it recorded. The court held that a valid trust had been created, which, once created, the husband could not, of course, revoke. This conclusion was reached by applying the rule of real property law, which obtains in many jurisdictions, that the title to the real property under such circumstances vested in Appleton, subject to a right of disclaimer on his part. This title, however, became at once subject to a trust in favor of Mrs. Adams. When Appleton disclaimed, as he did in this case, the legal title reverted to Adams, but subject to the trust in favor of his former wife. In other jurisdictions, although it is held that under similar circumstances the assent of the trustee is presumed until the contrary is shown, the same result is reached when the trustee on learning of the trust refuses to act (40). In all these cases the court, if necessary, will appoint a new trustee to carry out the trust. It is not necessary that the trustee's disclaimer be by deed; it may be by parol (41). If, however, the one named has once accepted, expressly, by words, or by his conduct, he cannot disclaim without the permission of the court of equity (42).

(40) Harvey v. Gardner, 41 Ohio St. 642.
(41) Adams v. Adams, 64 N. H. 224.
(42) Kennedy v. Winn, 80 Ala. 165.

§ 122. Effect of death of trustee before instrument creating trust takes effect. A will does not take effect until the death of the one making it, and is revocable until that time. Suppose a will leaves property to X and his heirs, in trust for Y, F, and others, and X dies before the testator. Under such circumstances the legal title fails to pass under the will, but descends to the heirs of the testator. Is the proposed trust thereby defeated? By no means. Equity considers that it would be unconscientious for the heirs of the testator under these conditions to keep for their own use the property to which they have thus acquired the legal title, and so renders them constructive trustees for the proposed beneficiaries. This is one case to which the equitable maxim that "equity will not permit a trust to fail for want of a trustee" properly applies. We must, however, beware of applying this maxim too broadly. If the instrument were a deed instead of a will, as in Adams v. Adams, discussed above, the result would be different. Suppose in that case, that Appleton, the proposed trustee, had been dead at the time Adams placed the deed upon record. No trust would have been created, as the title never would have left Adams, and equity would not compel him to carry out the ineffective attempt at a gift. On the other hand, if Adams, having executed and recorded the deed in the belief that Appleton was alive, had died in that belief and without knowing of his failure to create the trust, it seems that equity would compel the heirs of Adams to carry out their ancestor's intention.

CHAPTER VI.

DUTIES AND LIABILITIES OF TRUSTEES.

§ 123. Duties and liabilities of trustees. In the space remaining, it is proposed to set forth in as plain a manner as possible the rules governing the duties of a trustee, and his liabilities. Except only in one or two extraordinary cases, a trustee is never liable to make good any loss sustained by the estate, unless he has been guilty of some breach of duty in his management and care of the property entrusted to him. In what follows, emphasis will be laid chiefly upon those rules which will be of the greatest practical importance to trustees in the discharge of their duties, rather than upon the merely legal aspects of those rules.

§ 124. Duty to carry out provisions of trust. Every trustee is of course bound by all the provisions of the instrument creating the trust, provided those provisions are not illegal or for some other reason held to be invalid and not binding. For this reason, the first thing that one who accepts the position of trustee under a will or other instrument should do, is to acquaint himself with the terms of the trust. He should of course obtain a correct and full copy of the instrument containing the trust, and, if it be at all long or complicated, he should also have prepared for him, at the expense of the estate, an epit-

ome of the chief provisions, which latter will be convenient for more ready reference (1). Having obtained the copies and epitome, the trustee should read them carefully, and always keep them in mind in dealing with the trust estate. "How often does it happen that the newly-fledged trustee, provided though he may have been, either in consequence of his own prudence or by the zeal of a solicitor (not unmindful of costs), with both a copy and an epitome of the will or deed under which he acts, forthwith and after but a hasty perusal, proceeds to bury these documents at the very bottom of a tin box, which is shoved away in some rarely visited corner and locked with a key not always forthcoming. There they remain for years, unconsulted and unthought of, until, it may be, complaint is made and action threatened for breach of trust. The wise trustee keeps these informing documents in the same drawer as his cheque-book, and thus secures himself from forgetting their existence; whilst not infrequently, in those idle moments which will occur in the life of the busiest man, he refreshes his memory by glancing over their contents" (2).

The purpose of all this is of course to put the trustee in a position such that he may in all respects whatever carry out the provisions of the trust. It will not be safe to depart from them, even in seemingly unimportant matters. If he does so, he does it at the risk of having to make good to the estate any resulting loss.

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(1) Birrell, Duties and Liabilities of Trustees. 20. Many of the practical suggestions in the present chapter were suggested by that excellent little work.

(2) Birrell, pp. 20-21.

§ 125. **Duty on acceptance of trust.** Having accepted the trust, and, having obtained the papers described, familiarized himself with the terms of the trust, the trustee should, if the estate has been already in the hands of previous trustees, make an examination of the condition of the trust estate. If it consists in whole or in part of funds invested in various securities, he should see to it that those securities are of a suitable and proper kind. What are proper investments is considered in § 128, below. If the trustee fails to exercise reasonable diligence to discover the condition of the trust-estate, and so fails to learn of breaches of trust committed by the prior trustees, or of the investment of the funds on insufficient or hazardous securities, he will become liable for any loss which results, and this although he himself did not have any hand in making the original investments (3).

§ 126. **Duty to exercise reasonable care.** In the ordinary management of the estate entrusted to his care, the trustee is required to exercise reasonable care, the care which an ordinarily prudent and reasonable man would use in his own affairs (4). Certain exceptions to this rule will be pointed out below. As the circumstances of no two cases are exactly alike, and as the "ordinarily prudent and reasonable man" does not exist as an objective fact, but is an ideal standard, different judges are apt to disagree in any given case as to whether the conduct of the trustee measures up to the standard or not. In one of the leading cases, it is pointed out that judges and lawyers, looking at a case after losses have

(3) Harvey v. Olliver, 57 L. T. 239.
(4) Speight v. Gaunt, 9 App. Cas. 1.

actually resulted from the trustee's conduct, "are apt to think business men rash," and, in doing so, overlook the fact that conduct of the kind in question in a very large number of other cases resulted not in loss, but in saving trouble, inconvenience, and expense (5). To do what the business community generally are in the habit of doing seems to be the exercise of ordinarily reasonable prudence and care, and in general it is. For example, at a time when Confederate money, during the Civil war, was circulating freely among people of ordinary prudence, it was no breach of duty on the part of a trustee to receive the same in payment of claims due the trust estate (6). Had the Confederate money been not circulating freely, but in bad standing in the community, the trustee would of course have been liable for any loss resulting from its acceptance (7).

§ 127. Standard of care for trustee. Perhaps one of the best statements ever made concerning the standard of care required of a trustee is that contained in the opinion of Lindley, L. J., in Whitely v. Learoyd (8), from which the following deserves quotation: "Care must be taken not to lose sight of the fact that the business of the trustee and the business which the ordinary prudent man is supposed to be conducting for himself is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The

(5) Speight v. Gaunt, 9 App. Cas. 1.
(6) Patton v. Farmer, 87 N. C. 337.
(7) Singleton v. Loundes, 9 S. C. 465.
(8) 33 Ch. Div. 355.

duty of a trustee is not to take such care only as a prudent man would take, if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take, if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That is the kind of business the ordinary prudent man is supposed to be engaged in, and, unless this is borne in mind, the standard of a trustee's duty will be fixed too low, lower than it has ever yet been fixed, and lower certainly than the House of Lords, or this court, endeavored to fix it in Speight v. Gaunt" (note 4, above).

Of course it is not possible for a trustee to transact personally all the business connected with the administration of a trust of any magnitude. He is accordingly entitled to employ agents to aid him, and, if he uses reasonable care in so acting, he is not responsible for any loss which may result from the default of the agents thus selected. This principle was laid down and expounded by Lord Hardwicke in Ex parte Belchier (9), perhaps the leading case upon the subject.

§ 128. **Duty in making investments.** Very often the instrument creating the trust describes the manner in which the trust fund is to be invested. In that event the trustee is bound by its provisions and must not invest in other securities. In many jurisdictions there are statutes specifying the investments trustees are permitted to make, but of course they may not invest in all of these, if the terms of the instrument creating the trust forbid. If

(9) Ambler 218.

there be no statute, and the trust deed or the will contain no directions as to investment, the rule as to exercising ordinary diligence applies (10). Investments in government securities and good first mortagages of real estate, based upon a conservative proportion of the valuation, are in some jurisdictions the only safe investments for a trustee to make, unless in pursuance of an order of court (11). The real estate on which a mortgage is taken should ordinarily not be situated in another jurisdiction, though the trustee may be safe in making such an investment at times (12). The subject is too large a one for us to set forth the details here, but the only safe rule for the trustee to follow is to observe all the requirements of the trust deed or the will, of the statutes if any there be, and in all doubtful cases to refrain from acting without the advice of the court of equity.

§ 129. Trustee should not mingle trust funds with personal funds. A rule, the non-observance of which probably leads to as many breaches of trust as the violation of all other rules put together, is, that the trustee should never under any circumstances or upon any consideration, mingle the trust funds with his own personal funds. To do so is to cross the danger line, for sooner or later it will lead in many cases to the unlawful use of a portion of the trust funds by the trustee for his own purposes.

§ 130. Trustee must not make a profit out of trust business. It is fundamental that the trustee must not attempt

(10) King v. Talbot, 40 N. Y. 76.

(11) Hemphill's Appeal, 18 Pa. St. 303; Halsted v. Meeker, 18 N. J. Eq. 136.

(12) Ormiston v. Olcott, 84 N. Y. 339.

in any way to make a profit out of the trust estate, or the transaction of business connected therewith. The only exception is where, by the deed or will creating the trust, or by statute, the trustee is allowed a compensation for his time and labor bestowed upon the management of the estate. No better statement of this rule can be given than that of Lord Brougham in the leading case of Docker v. Somes (13), as follows: "Wherever a trustee, or one standing in the relation of a trustee, violates his duty and deals with the trust estate for his own behoof, the rule is that he shall account to the cestui que trust for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go not to the trustee who has so applied the money, but to the cestui que trust whose money has been thus applied. In like manner (and cases of this kind are more numerous) where a trustee or executor has used the fund committeed to his care in stock speculations, though the loss, if any, must fall upon himself, yet for every farthing of profit he may make he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern."

§ 131. Trustee not liable for default of co-trustees.

(13) 2 M. & K. 655.

Where there are two or more trustees, any one of them is not liable to the trust estate for losses resulting from the acts or defaults of his co-trustees, unless (and note carefully the exception) by his negligence the other trustees have been enabled to make a fraudulent use of the trust property. For example in Trutch v. Lamprell (14) there were two trustees who had disposed in a suitable manner of the trust property, receiving a check for the proceeds. One trustee handed this to the other, who proceeded to apply it to his own uses and then decamped. It was held that under the circumstances the entrusting of the proceeds in this fashion to one of the trustees constituted negligence on the part of the other, and that he was liable to make good the loss. This brief statement of the duties and liabilities of a trustee is intended to suggest only a few of the more important rules with reference to the matter. In all cases of doubt, competent legal advice should be secured by the trustee.

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(14) 20 Beav. 116.

APPENDIX A

ESTATES OF DECEDENTS.

§ 9. A trespasser enters A's land, breaking his fence and damaging his crops. He also steals A's horse and rides it away. At common law, for which, if any, of A's claims against the trespasser will an action survive A's death?

Brown publishes an article libeling Smith, who, by reason of mental anguish suffered through the publication, becomes ill, and incurs necessary medical expenses in treating his illness. He also suffers a loss to his business by reason of his illness. At common law, has he a right of action against Brown which will survive his own death?

§ 10. Suppose in the preceding case that Smith had reduced his claim against Brown to a judgment. Would his executor or administrator then have any claim against Brown?

§ 13. A person dies intestate leaving real estate valued at $10000, personal property valued at $1000, and debts to the amount of $500. How are the debts satisfied?

§ 14. A man dies intestate, owning real estate in a foreign state, and leaving a wife and a son. By the law of the state in which he resided, real estate is divided equally between a surviving wife and a child, but by the law of the state in which the land lies, the son gets two-thirds, and the wife one-third. How should the property be divided?

A man dies leaving a will devising real estate in a foreign state to a corporation. By the law of the state in which he resided, and also by the law of the state in which the corporation was chartered, a corporation can take real estate by testamentary devise, but by the law of the state in which the land lies it cannot. Can the corporation take under the will, or not?

§ 18. An estate in realty was limited to Sarah for life, and after her death to her sister Ann. Upon Sarah's marriage, and the birth of issue, has her husband, at common law, an estate by curtesy?

§ 23. An unmarried man acquires real estate and afterwards marries. At common law does his wife acquire dower in the property if she survives him?

A married man acquires real estate and afterwards sells it during the marriage and executes a deed of conveyance in which his wife does not join. The purchaser purchases in good faith and pays his money, not knowing that the vender is married, but on the contrary believing him to be single. Is the wife entitled to dower if she survives the husband?

Is a wife, at common law, entitled to any other rights in a husband's realty besides the right of dower?

§ 26. In a certain case in a common law jurisdiction, an heir and a widow were unable to agree upon a fair division of the deceased husband's real estate for the purpose of assigning the widow her dower, and the court decreed that the property should be sold, and that the widow should be given one-third of the proceeds. Was this a proper decree?

§ 29. A man dies leaving assets of $500 and unsecured debts of $1000. He is survived by a widow and minor children. Is his widow entitled to a widow's allowance?

§ 31. A man dies intestate leaving realty to be divided among the following descendants: A son, a daughter, two children of one deceased child, and three children of another deceased child. How is the property divided?

§ 33. A man dies intestate, leaving realty, and survived by a widow and two children. Another child is born after the father's death. What share of the property, if any, does the posthumous child receive?

§ 34. A man dies intestate, leaving realty, and survived by a son and a daughter, and by his father and mother. How is his property divided?

A man dies intestate, leaving realty, and survived by two sons, one of whom is an alien. What are the rights of the latter at common law?

§ 40. What is an advancement?

§ 41. What becomes of property left by one who dies intestate, leaving no relatives entitled to take under the law of intestate succession?

What is meant by escheat?

§ 42. A man dies intestate leaving real estate mortgaged to the full extent of its value, and survived by a widow and a son. As between the widow, the son, and the mortgagee, who is entitled to the property?

§ 44. A executes an instrument conveying real estate to trustees in trust to hold for his own use for life, and after his death to convey to his son. Is the instrument a will?

Brown makes a will devising all of his realty to his son, and informs his son of such fact. The son, relying upon the will, borrows money, and as security therefor, executes a mortgage of the premises in question. Afterwards Brown revokes and destroys the will, and makes a new will devising the land to another son, and dies leaving the second will in force. Has the mortgagee any rights in the property?

§ 46. A man is injured in a railroad collision, and while lying beneath the wreckage and apparently mortally injured, he hands a fifty dollar bill to the conductor, who has befriended him, stating that he is doing so by way of gift in view of his expected demise. Shortly afterwards, and before being extricated, he dies, and his administrator claims the money. Is the conductor entitled to keep it?

In the preceding case, suppose that the injured passenger should have recovered, and should have himself demanded the money back. What decision?

What is a gift mortis causa?

A person on his death-bed delivered a deed to realty to his cousin, with an accompanying declaration showing that he intended to make a gift mortis causa of the property. Is the gift valid?

§ 51. A person who bore the same name as a testator falsely represented to the testator that he was a cousin of the latter. Believing such representation to be true, and being induced by it, the testator bequeathed property to the imposter's minor son, whom he did not know and had never seen. The child was entirely innocent in the matter. Is the bequest void? Is it voidable?

§ 53. A testator intending to devise all his land to his son, dictated to his lawyer the words: "I give to my son all my land." The lawyer knowing that the testator owned land in section 10, and thinking that that was all the land he owned, although in fact he owned other land, wrote in the will as follows: "I give to my son all my land in Section 10." The testator executed this expression without reading it over. Can the will be corrected at probate by striking out the additional words?

§ 58. A testator was a monomaniac on the subject of his supposed relationship to foreign nobility, believing himself to be King Edward of England. Is this fact alone sufficient to void his will devising realty to a remote relative and ignoring his wife and children?

§ 64. One who represented himself as a priest induced a testator to make a bequest in his favor by continual threats that otherwise he would place upon the testator a curse which would prevent his soul from reposing in peace. The testator believed in the purported priest's power and made the bequest in order to avoid the supposed curse. Can the bequest be set aside?

§ 68. What is a nuncupative will?

§ 70. What is a holographic will?

§ 81. A statute required the attesting witnesses to a will to sign in the presence of the testator. A will was signed by two attesting witnesses in a room next to the one in which the testator lay in bed, at a point where the witnesses were plainly within his view, although he did not in fact watch them sign. Was the attestation sufficient?

§ 88. A will recited that the testator devised to his son a piece of land described in a certain deed to himself, which deed was fully identified in the will by its date, place of execution, names of parties, and place and date of recording. Could the deed be referred to in order to ascertain what land was intended to be devised?

§ 89. What is a codicil?

§ 90. After a will has been duly executed and attested, a testator changes it by striking out a sentence at one place, and by adding an interlineation at another. He does not re-execute the will, or have it re-attested. Are the changes operative?

§ 106. What is meant by a lapsed legacy?

§ 110. What is an executor?

What is an administrator?

§ 116. A man dies leaving personal property amply sufficient to pay all claims against his estate, and the expenses of administration. In a state where the common law prevails, who, as between the administrator and an heir, is entitled to the immediate possession of realty left by the deceased?

§ 119. On whom should demand be made for payment of a claim against a deceased estate?

§ 124. Can a will which has been lost or destroyed be admitted to probate?

§ 125. A testator dies leaving real estate in Illinois and Michigan, which he devises respectively to his two sons. The will is offered and admitted to probate in the probate court of Illinois. How can the second son obtain title to the land in Michigan?

§ 129. How does the appointment of an administrator differ from that of an executor?

§ 132. What is an administrator de bonis non?

§ 134. How is appraisement of personal property belonging to a deceased's estate made? Is it conclusive as to the value of the property?

§ 138. An Illinois executor is traveling in Indiana. Can an Indiana creditor of the deceased, finding the executor there, sue him in an Indiana court for a claim against the deceased's estate?

§ 140. A man dies leaving property in Illinois and Indiana, and administrators are appointed in each state. A resident of Indiana, who was indebted to the estate comes into Illinois, is sued by the Illinois administrator, and satisfies the debt. He returns to Indiana and is there sued by the Indiana administrator for the same debt. Has he a defense?

§ 143. After a man's death and before the appointment of an administrator, personal property belonging to the estate is wrongfully converted. Afterwards an administrator is appointed and he sues the wrongdoer for the conversion. The latter raises the defense that at the time of the conversion the administrator had no title to the property. What decision?

§ 152. Are growing crops considered personalty or realty?

§ 176. How is the personal representative compensated for his work in behalf of the estate?

§ 187. At common law, how can the personal representative divest himself of the office?

§ 189. A man who had enlisted in the Civil war was believed to have been killed in battle. A will left by him was found and opened, and the person named therein as executor was duly appointed by the probate court and duly qualified. He proceeded to administer the estate, paying claims against the estate, reducing to possession claims in favor of the estate, selling real estate, under order of the court, for the purpose of paying debts, and paying legacies to the various legatees. Likewise, the heirs and devises took possession of the remaining real estate, some of which they sold to bona fide purchasers. Shortly afterwards the supposed decedent returned. What were his rights, if any, in the premises?

APPENDIX B

EQUITY JURISDICTION.

§ 2. What was provided by the 24th Chapter of the Statute of Westminster II?

§ 3. What two features of the common law courts made necessary another tribunal, in order that justice might be done in all cases?

§ 10. What is the essential difference between the character of relief given by a court of law, and by a court of equity?

Two men make a contract for the sale of a piece of real estate, part of their agreement being that they will meet at a certain bank on the first of October, when the buyer shall pay the purchase price, and the seller shall deliver to him a deed. On October 1 the buyer appears at the bank with the money in his pocket, but the seller does not appear. The next day they meet, and the buyer demands a conveyance, which the seller refuses to make. The buyer files a bill for specific performance, and the defense is raised that it is then impossible to compel a performance in accordance with the terms of the contract, since the 1st of October has passed. What decision?

§ 11. Smith offers Brown a lot for $1000.00 on condition that if Brown wishes to purchase it, he must signify his acceptance of the offer on the following Monday. On Monday, Brown starts for Smith's place of business, but is delayed by a street car wreck, and does not see Smith until the next day. On Tuesday, Smith still has the lot, but he refuses to make a conveyance, although the value of the lot is the same as it was on Monday. Can Brown obtain specific performance?

§ 12. Williams owns a number of lots in a certain subdivision, and agrees to sell an inside lot to Rogers for $500.00, which is the market value of all the inside lots. Without seeing the lots at all, Rogers selects one at random from the printed plat, and contracts with Williams for its purchase. Afterwards Williams desires to keep the particular lot selected, for the reason that it adjoins one on which his cousin had commenced to build, (the cousin being an utter stranger to Rogers), and to show his good faith Williams offers Rogers instead, any one of the other inside lots, or one of the corner lots, which are

worth $800.00 each, for the same price. Rogers demands the particular lot, and files a bill to compel its conveyance. What decision?

§ 18. Defendant made a contract by which he agreed to sell to complainant a certain race-horse, which it was admitted was unique and of a speculative value. Complainant filed his bill praying specific performance of the contract, in an Illinois court, where the complainant and defendant both resided, and where service was had upon the defendant, but at the time the bill was filed, the horse was racing in Kentucky. What decision?

§ 22. Complainant contracted with defendant to sell a certain lot, 50 feet in width, for the price of $5000.00. Afterward it appeared that complainant had title to only 40 feet of the lot, the remaining ten feet having been dedicated to the public as a roadway. He thereupon demanded that the defendant perform the contract with compensation, i. e., take the forty feet for $4000.00, and upon the latter's refusal, filed a bill praying such relief. What decision?

§ 29. Two men made a contract for the conveyance of realty, and before the time for performance arrived, the buyer died intestate, leaving several heirs and next of kin. When the time for performance arrived, the personal representative tendered the seller the purchase price and demanded a deed conveying the land to himself, and upon the seller's refusal to execute and deliver such a deed, filed a bill praying such relief. What decision?

§ 32. What, in general, is the peculiar doctrine of equity as to whether or not time is of the essence of contracts?

§ 36. Williams contracted to purchase a piece of land and paid the full purchase price in advance, the agreement being that he should receive a deed at a future date. Before the time for conveyance arrived, he executed and delivered to Rogers a deed purporting to convey to the latter the premises in question. Did Rogers obtain any interest in the property?

§ 41. The parties to a lease of realty, a short time before the term expired, made an oral contract by which the lessor agreed to sell the property, and the lessee agreed to purchase it, at a price agreed upon. When the term expired the lessee remained in possession and demanded a conveyance, and upon the lessor's refusal to convey, filed a bill for specific performance. The lessor pleaded the statute of frauds. What decision?

§ 57. The patentee of a machine for sewing on shoe-buttons placed his machines upon the market and sold them with a notice attached to each that they were licensed for use only with wire manu-

factured and sold by him. He sold one of the machines to A, who in turn sold it to the defendant, and the latter commenced using it with wire which he purchased in the open market at less than half the price which the patentee charged for his wire. The wire purchased by the defendant was also better adapted for the purpose for which it was used. The defendant, when he purchased, had notice of the restriction. The patentee sought to enjoin him from using the machine with the wire purchased in the open market. What decision?

§ 63. A telephone company, in violation of its contract with a subscriber, refused to install a telephone, and the latter filed a bill praying specific performance. The company resisted on the ground that equity would not decree specific performance of an act requiring the exercise of considerable time and energy by the court, for its supervision. What decision?

§ 35. A professional baseball club employed a pitcher of exceptional skill and ability to pitch for its team. Shortly before the final game of the season, which was widely advertised, and was to decide the championship, the pitcher, in violation of his contract, refused to pitch any more for the team. The officers of the club filed a bill against him for specific performance. What decision?

§ 67. Suppose in the preceding case that the pitcher had also contracted not to pitch for any other team during the period covered by his contract with the complainants. Could he have been enjoined from pitching for the opposing team in the game in question?

§ 73. Complainant and defendant orally agreed upon the sale by the latter to the former of a certain lot of land, which both of them viewed at the time, for $1000.00. Afterwards they drew up an agreement in writing in which the defendant, intending to describe the lot in question, inserted the legal description of another lot which he owned, worth $1200.00, which agreement both signed. Is complainant entitled to a conveyance of the more valuable lot for $1000.00?

§§ 85, 86. A and B contracted in writing for the sale by the former to the latter of 300 acres of farm land, being part of a farm of 1000 acres which A owned, for the price of $8000.00, the land being worth $10.00 an acre, and the house being worth $5000.00. Their agreement was that the 300 acres should include that part of the farm upon which the farm house stood, but by their mutual mistake they described in the deed from A to B, 300 acres which did not include the house. A afterwards sold the remaining 700 acres to C for $10.00 an acre, for which C paid him $7000.00, but, making the same mistake as

before, A drew a deed which described 700 acres including the house. When C discovered that his deed included the house, he claimed it from B, who was in possession, and B filed a bill praying reformation of the two deeds. What decision?

§ 88. The owner of a life estate in certain property made a lease of the premises for the term of his life. Afterwards the lessee agreed with another person to sub-let a portion of the premises, and in pursuance of his agreement, executed and delivered a sub-lease, and received in consideration the sub-lessee's note in payment of a year's rent in advance. At the time the agreement for the sub-lease was made, but unknown to both parties thereto, the original lessor was dead. The sub-lessee filed his bill against the sub-lessor, praying cancellation of the note. What decision?

§ 105. Two persons made an oral agreement for the conveyance of real estate. Afterwards they drew up a written contract, in pursuance of their oral agreement, which both signed, and subsequently a deed was executed and delivered, in pursuance of the written contract, by one to the other. By their mutual mistake, the written contract failed to conform to the oral agreement, and likewise the deed, following the written contract, did not conform to the oral agreement. Is either party entitled to have the deed reformed?

§ 136. Real property, consisting of a house surrounded by large grounds with several large trees which added greatly to the value of the property, is devised to the testator's wife for life, and after her death to her son. The life tenant takes possession and begins to cut down the trees. Has the remainderman any remedy in equity to prevent such destruction?

§ 138. Suppose in the preceding case that at the time the bill is filed, half the trees have been cut down, and the life tenant is threatening to cut down the rest. What are the remainderman's rights in equity?

§ 139. What is meant by "permissive waste"?

§ 141. What is meant by the phrase "without impeachment of waste"?

§ 142. What is meant by "equitable waste"?

A life tenant took possession of property under a devise to him "without impeachment of waste". The property contained a tract of timber-land which he proceeded to cut down, removing both the old timber and the young timber. What rights, if any, had the remainderman in equity?

§ 143. Suppose in the preceding case that before the bill is filed,

the life tenant in possession has cut down all the trees, and has thus completed the damage. Has the remainderman any rights in equity?

§§ 186, 190. An insurance company, using uniform policies, denies all liability under them for loss from fire caused by an earthquake. May several persons insured under such policies, file a bill in equity in behalf of themselves and all others similarly situated, against the company, and on proof of liability, obtain a decree for payment, if the fact of and amount of loss are not disputed in any case?

In the preceding case, if actions at law had been brought by several policy-holders, could the insurance company have obtained any equitable relief against the plaintiffs at law?

Wallace holds a bond made by Snow conditioned on the full performance by Snow of a building contract with Wallace; and also two notes purporting to have been made by Snow and payable January 1, 1909, the one to the order of Wallace, the other to the order of Joyce, and endorsed by Joyce to the order of Wallace. Snow claims that he has fully performed the condition of the bond, that the first note was obtained from him by fraud of Wallace, and that his name on the second note was forged by Joyce. To what equitable relief, if any, as to these instruments is Snow entitled?

§ 198. Levin, a grocer, by fraud induces Barker to draw a check to Levin's order, representing that the amount of the check is in payment of a balance due on Barker's account for groceries. Afterwards Barker finds from an examination of his accounts that there was nothing owing from him to Levin at the time that he gave Levin the check, and that he has Levin's receipt showing the amount to have been previously paid in full. Has Barker any rights against Levin in equity?

§ 213. Martin brings a horse to Hopkins, a liveryman, and leaves it there six weeks, when he returns and demands possession of it. At the same time Richardson appears and demands the horse, claiming that it had been stolen from him by Martin. Hopkins refuses to deliver the horse to either party, claiming a lien on it for board. Can he maintain a bill of interpleader?

APPENDIX C

TRUSTS AND TRUSTEES.

§ 3. Where was the right of a cestui que use first recognized?

§ 5. How could a use be destroyed through one taking from a feoffee to use?

§ 6. A, without consideration, conveys land to B, a distant relative, who has supported him for many years past. Who is entitled to the use of the land?

§ 7. Under the early common law, could a wife obtain dower, or a husband curtesy, in an equitable estate?

§§ 9, 10. What important legislation was enacted in the reign of Henry VIII?

What was its purpose, and what was its effect?

§ 11. What is the difference between a use and a trust?

§ 13. A holds real property in trust for B. He dies. Can B enforce the trust against A's heirs to whom the title passes upon his death?

§ 14. On what ground is a transferee of a trust-res from a trustee compelled to observe the trust?

§ 15. What are the rights of a cestui against a donee from a trustee, who takes with notice, and against one who takes without notice?

§ 16. In America, in what manner can constructive notice of a trust in real estate be given to all future transferees?

§ 17. Smith holds property in trust for Webster. Gray, in ignorance of the trust, purchases the property from Smith, pays Smith the purchase price, and has the property transferred to his wife. Can the wife hold the property freed from the trust?

§ 18. What are the rights of one who takes with notice, from an innocent purchaser for value, property which was once held in trust?

§ 20. A purchaser for value pays his money in ignorance of a trust, but receives notice before obtaining a transfer. As between him and the cestui. who prevails?

§ 21. What would the situation be if the purchaser in the preceding

question obtains a transfer before receiving notice, but has not paid his money at the time he receives notice?

§ 22. Or if he obtains a transfer without notice, but has paid only part of the purchase price at the time he receives notice?

§ 24. As between the trustee and cestui, who is entitled to possession?

§ 33. What is an express trust? A constructive trust?

§ 34. What courts have jurisdiction of actions by cestuis against their trustees for breaches of trust?

§ 35. In order to enforce a trust, is it necessary that the trust-res be within the jurisdiction of the court?

Is it necessary that the trustee be within the jurisdiction?

§ 36. Must a cestui suffer if a trustee refuses to perform his duty in regard to interference with the property by a third person?

§ 37. What additional rights does possession of the trust property by the cestui give him?

§ 39. Williams holds certain shares of stock in a corporation in trust for Johnson. Who is entitled to vote the shares?

§ 40. Trustees are engaged in the operation of a street railway line, and one of their motormen negligently injures a pedestrian. Are they liable in an action of tort?

§ 43. In order to create a trust, is it necessary that the word "trust" be employed?

§ 45. The owner of certain property voluntarily declares himself trustee of the property for another. Does the declared cestui acquire any rights thereby?

§ 46. Property is deeded to a trustee in trust to secure the payment of a loan, the terms of the trust being that the trustee shall hold the property until the loan is repaid. The trustee derives no benefit from the trust. Is he bound to observe the terms of the trust?

§ 46a. The owner of property declares his intention of giving it to another, using the words, "I give you this property." He does not make a delivery of the property, and there is no consideration for his gift. Can the gift be enforced on the ground that the words used constitute a declaration of trust?

§ 52. Stone contracts to purchase certain land, paying the purchase price and obtaining a contract in writing, by which the owner agrees to deliver to him a good warranty deed. By another instrument in writing Stone assigns his interest in the property to a trustee for the use of another person. Has the latter any rights which can be enforced through his trustee?

§ 53. What kind of property is included in the English statute of frauds in the section relating to trusts?

§ 54. Grey orally declares a trust in certain land in favor of Brown. Six months later he admits, in a letter written to a third person, that he holds the property in trust, on the terms stated by him in his oral declaration. Can Brown enforce the trust? If so,from when does the trust date as regards the question of the rights to profits from the land?

§ 55. A statute declared all oral trusts in land unenforceable unless evidenced by a writing subscribed by the party to be charged. Jones orally declared a trust in some land in favor of his nephew and afterwards he sent a typewritten letter to the nephew concerning the land in question. In the body of the letter, above his signature, he described the land, and in a post-script at the end he admitted the trust and its terms. Was the trust enforceable?

§ 57. What are the three classes of trusts?

What kind of trust is one based on an intention duly expressed in words contained in a will?

What kind of trust is one based upon an oral declaration of trust where the statute of frauds does not apply?

§ 58. What is a constructive trust?

What is the theory on which constructive trusts are based?

§ 61. Before the statute of uses, if A paid the purchase price for land and had the legal title transferred to B, what was assumed in a court of equity?

How could this presumption be rebutted?

How was such a transaction affected by the statute of uses?

§ 62. Why is a resulting trust not within the statute of frauds?

§ 64. Before the statute of uses, a man purchased land, paying the purchase price and having the legal title transferred to his son. Was there a resulting use to the parent?

§ 65. Suppose in the preceding case that the parent had occupied and cultivated the land for his own use. Was there a resulting use to him?

§ 66. A purchased land, paying $1,000.00—that sum being half the purchase price—and taking the legal title, the other $1,000.00 being paid by B. There was evidence that B had lent to A $1,000.00 for the purpose of enabling him to purchase the land. Was there a resulting trust?

§ 67. A principal entrusted his agent with funds for the purpose of buying real estate, and the agent, contrary to his authority, bought

the real estate and took the title in his own name. What interest, if any, did the principal acquire in the land?

§ 68. What effect did the statute of uses have upon the method of conveying the land?

What is a deed of bargain and sale?

If the deed recites a consideration, is it necessary that one be paid?

§ 69. If Grey executes a deed of bargain and sale of certain land to Webster, no consideration being paid, is there a resulting trust in favor of Grey?

What was the effect of the statute upon resulting uses?

§ 70. In the case above, if Webster had orally agreed to reconvey the land to Grey on the latter's request, would there have been a resulting trust in favor of Grey?

Would there have been a constructive trust in his favor?

§§ 70, 71. A man deeds his lands to trustees in trust for them to manage it until his death, and then to convey it to such person as he shall by will appoint. He dies without leaving a will. Can the trustees keep the land? If not, in whose favor does equity raise a trust?

§ 73. A testator devised his realty to trustees in trust to convey it to a certain church corporation. Under the law the church could not take land by devise, either directly or indirectly. What should be done with the land?

A testator devised his realty to trustees in trust to sell it and devote the income toward the maintenance of a society for teaching anarchy. It was held that such an object was illegal. Should the trustees be allowed to keep the land?

§§ 75, 76. A testator devised land to his nephew subject to certain trusts, the words of the will being: "to my nephew John subject to the trusts hereinafter enumerated." The performance of the trusts did not exhaust the property. What should be done with the residue?

In a similar case the words used were: "to my nephew William, in trust, etc." What should be done with the residue?

§ 77. A testator devised property to trustees expressly upon trust for a certain purpose, which, upon being carried out, left a residue. Another part of the will provided that his son, who was the only heir and next of kin, should have no share of the estate. What should be done with the residue?

§§ 78, 79. A testator devised real estate, as it appeared on the face of the will, as an absolute gift to the devisee. Before the testator's death the devisee had been informed of the intended devise, and had

agreed to take the property upon a trust in favor of the testator's wife. The testator is survived by a wife and a son. Can the trust be enforced? If so, in whose favor?

§ 80. Suppose in the preceding case that the devisee had not been informed of, and knew nothing of the testator's real intention, until after the testator's death. Could the "secret trust" have been enforced?

§ 81. A testator devised real estate, as it appeared on the face of the will, as an absolute devise, but upon a previous oral agreement with the devisee that he was to hold the property in trust and use the income for the support of a filibustering association. Can a trust be enforced in the property? If so, in whose favor?

§ 82. A testator was induced by his son to devise all of his property to the latter, upon the promise of his son to sell the property and divide the proceeds with his sister. Was there an enforceable trust in favor of the sister?

§§ 85, 88. Williams delivered to his broker certain shares of stock in a corporation, issued in the name of a third person, and endorsed in blank, for the purpose of having the broker procure their registration in Williams' name. The broker, contrary to his authority, traded the shares for shares in another corporation, which latter shares immediately thereafter greatly rose in value. Has Williams any rights in the shares of the second corporation?

Suppose in the preceding case that the broker should have sold the shares in the second corporation, and should have received therefor a sum of money in excess of the value of the original shares. Is Williams entitled to the money?

Suppose in the preceding two cases that the broker had stolen the original shares from Williams. Could the latter follow the proceeds on the ground of following a trust fund?

A bank cashier embezzled funds entrusted to his care and used them to purchase realty. The realty rose in value, until, at the time the embezzlement was discovered, it was worth twice as much as the total amount embezzled. Upon learning of the facts, the bank claimed the right to have the property transferred to it, but the cashier refused to make the conveyance, offering to repay the amount embezzled with compound interest. Upon a bill being filed by the bank to enforce an alleged trust, what decision?

§ 89. Suppose in the preceding case that the cashier had used part

of his own money to purchase the land, what would be the rights of the parties?

§ 90. A bank cashier embezzles $500.00 and uses it to purchase realty for $1,000.00, paying the balance out of his own funds. The realty decreases in value, and at the time the facts are discovered is worth only $600.00. What are the rights of the bank in the realty?

§§ 91, 93. A trustee embezzled certain funds and deposited them in his own bank, mingling them with his own funds. Afterwards checked out a part of his deposit and squandered it, then another part, which he used to purchase a piece of realty, and subsequently the balance, which he squandered. Could the defrauded cestui claim a trust in the realty?

§ 95. Plaintiff by his own labor and expense discovered a mine, but before making a location thereon under the mining laws, disclosed the location to defendant in reliance upon an agreement between them that the mine, when located, should be their joint property. Defendant, contrary to their agreement, located the mine in his own name. What are the rights of the plaintiff in the premises?

§ 101. What is a charitable trust?

Is it necessary to the creation of a charitable trust, that the word "charity" be employed?

§§ 102, 107. A testator bequeathed a sum of money to be divided equally between the "Indian Missions and the Domestic Missions of the United States." Is this a good charitable trust?

A testator bequeathed a sum of money to trustees to be divided among such "charitable or religious institutions and societies" as they might select. Is this a good charitable trust?

§ 109. Can an infant be a cestui que trust?

Can an idiot, imbecile, or insane person?

§ 116. Can an insane person be a trustee?

§ 130. The instrument creating a trust provided that the trustee should deposit the funds in a savings bank, which would have paid 4% interest upon the amount deposited. The trustee, without authority, used the funds in a stock gambling transaction, and made a profit of 10%. Is he entitled to keep the amount earned in excess of 4%?